Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

TWELVE PIECES OF PROPERTY ET. AL.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari TIORARI

WEIDNER & ASSOCIATES, INC.
Attorneys for Petitioner

By: Phillip Paul Weidner
Phillip Paul Weidner
Attorney of Record

330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

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I. QUESTIONS PRESENTED FOR REVIEW

1. May the government force a defendant to forego one United States Constitution Fifth Amendment protection (self-incrimination) to preserve other constitutional rights (5th, 6th, and 14th Amendments; double jeopardy, due process, right to counsel and protection against punitive taking of property)?

2. Does it violate fundamental fairness and due process of law to force a defendant to forego a defense to punitive administrative forfeitures to preserve fifth amendment privileges based upon existing law [i.e., existing case law interpretation and restrictive application of "limited use immunity" under Simmons v. United States, 390 U.S. 377 (1968), as not applying to claims of ownership in forfeitures] and then, based upon a temporary change in the law by one three judge Ninth Circuit panel, [i.e., United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert. den'd, 518 U.S. 1007 (1996), which was subsequently disavowed as dicta by another three-judge Ninth Circuit panel in United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999),] hold a defendant to a duty of "clairvoyance" as to such shift in the law, so as to imply a knowing waiver to retroactively deny double jeopardy protection notwithstanding prior punishment?

3. Where the government makes a tactical decision to gain prosecutorial advantage to force a defendant to face parallel 21 U.S.C. § 841 et seq. criminal drug prosecution and forfeitures and punitive 21 U.S.C. § 881 civil forfeitures based on the same offenses, said forfeitures factually, tactically, statutorily and procedurally in personam under United States v. Ursery, 518 U.S. 267 (1996), with the "purpose or effect" of punishing a defendant (Id. at 289 n.3) and in fact punishes a defendant by forfeiting his property due to his forced decision to forego a potentially incriminating

claim, and defense, in the punitive civil forfeitures, as a result of the "Hobson's choice" presented by said government's tactical decision to "force a fight on two fronts," do the doctrines of fundamental fairness, due process, the rights against self-incrimination and to counsel, and double jeopardy preclude the subsequent criminal prosecution or subsequent punitive in personam forfeitures?

4. When a defendant has suffered punitive in personam forfeitures of his property under United States v. Ursery, 518 U.S. 267 (1996), can he then be placed in jeopardy of subsequent prosecution and punishment, and tried, convicted, and sentenced to two life terms and have additional property subject to punitive in personam forfeiture based on the same offenses and evidence that were the basis of the prior forfeitures?

5. Were the forfeitures, that are the subject of this writ of certiorari, factually, tactically, statutorily and procedurally, in personam?

6. Did the forfeiture proceedings violate Mr. Plunk's rights of due process under the fifth and fourteenth amendments and his rights to counsel under the sixth amendment and his rights against double jeopardy under the fifth amendment?

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Petitioner, Twelve Pieces of Real Property et al., by and through owner Gerald Frank Plunk, who has been subjected to parallel and serial punitive in personam forfeitures and criminal convictions, respectfully prays for a Writ of Certiorari to review the judgment herein of the United States Court of Appeals for the Ninth Circuit dated January 10, 2003 in Ninth Circuit No. 98-35702 [App. 1].

IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgment of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum / order filed January 10, 2003 in Ninth Circuit No. 98-35702. Petitioner's Petition for Rehearing was denied June 18, 2003 [App. 1].

V. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Ninth Circuit Memorandum / Order was filed January 10, 2003; and, a timely Petition for Rehearing was denied on June 18, 2003 [App. 1].

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, 18 U.S.C. §§ 853, 881, 19 U.S.C. §§ 1602-1609, 21 U.S.C. §§ 841, 843, 846, 848, 853, 881, and 28 U.S.C. § 1254. The text of same and related jurisdictional statutes and procedural rules are set out in the Appendix.

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

A. Introduction

Mr. Plunk, owner of the property, was subject to parallel and serial punitive in personam forfeitures and criminal convictions, serving double life terms for two post-forfeiture convictions of 21 U.S.C. §§ 841(a)(1) and 846 offenses (distributing and conspiracy to distribute cocaine) factual basis of which was same evidence for prior in personam punitive administrative forfeiture(s) within the holding of United States v. Ursery, 518 U.S. 267 (1996).

Accordingly, based on same criminal offenses, allegations and evidence, Mr. Plunk has been subjected to four initial in personam summary administrative punitive forfeitures of property seized from his person and house, criminal trial with conviction and two life sentences, and after defense judgment of acquittal as to forfeiture, two subsequent post-criminal sentencing, punitive in personam forfeitures of numerous airplanes and real property [App. 53; 69 126-143].

Although instant case, is in fact "Plunk IV," no court has yet reached or ruled on merits as to obvious double jeopardy issues encompassed by parallel and serial in personam punitive forfeitures of Mr. Plunk's property and criminal convictions, barred by the Supreme Court holding in Ursery.[1]

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[1]Most of Mr. Plunk's charges were initially dismissed on double jeopardy grounds by the magistrate and the U.S. District Court on November 18, 1996, under the 9th Circuit decision in U.S. v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995). They were reinstated in the interlocutory appeal(s) in No. 94-30421 and 94-30422, 95 WL 619299 (9th Cir. United States

B. Statement of Facts and Procedural History

1. Criminal Case(s):

On March 22, 1994, Mr. Plunk was indicted on single 21 U.S.C. §§ 841 and 846 count of allegedly conspiring to distribute cocaine within Alaska (hereinafter the "Alaskan I Conspiracy") between Fall of 1987 and April of 1991. In Igiugig, Alaska, at Big Mountain Lodge, he learned there was an arrest warrant, and he surrendered [App. 163].

During his initial meeting with federal authorities, allegations were made concerning government belief Mr. Plunk participated in and/or had knowledge of an additional 21 U.S.C. §§ 841 and 846 cocaine conspiracy involving transportation of cocaine across the United states for a fee (hereinafter the "Lower 48 Conspiracy") [App 146].

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v. Plunk, October 17, 1995) cert. den'd 517 U.S. 1188 (1986) (hereinafter "Plunk I") based on United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert. den'd 518 U.S. 1007 (1996) which was a new, unforeseen position by one Ninth Circuit panel affording (contrary to prior law, and now to current law) "Simmons Use Immunity" for claims of ownership as to forfeitures, which was given retroactive application to Mr. Plunk to manufacture a "waiver," notwithstanding it was unprecedented under the law. Cretacci was then disavowed by another Ninth Circuit Panel in United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999) after the Supreme Court reversed United States v. $405,089.23 and Ursery. The panel in Scrivner, held Certacci was mere dicta, and Scrivner could (as Mr. Plunk and his counsel had predicted and feared the law would be) in fact be convicted on basis of non-privileged claim of ownership in forfeiture properties as there was no such use immunity.

Mr. Plunk was subsequently reindicted and detained without bail while awaiting trial.[2] Mr. Plunk's case went to trial on or about July 24, 1995. Significantly, jury hung on CCE count (Count 2), acquitted on one distribution counts (Count 9), hung on another distribution count (Count 10), and hung on Alaskan Conspiracy count (Count 12)[App. 33-35].

Although Mr. Plunk only faced a sentence of 324-405 months pursuant to an offense level of 41, his sentencing was adjusted upward 2 offense levels such that he received two life sentences without parole, based upon a purported finding he had testified falsely at Pierson's sentencing because Pierson, after months of incarceration including a brutal assault by inmates, testified falsely at Mr. Plunk's sentencing hearing as to Mr. Plunk's knowledge of Pierson's mens rea in an attempt to curry favor with the Government in his own case.[3] Notes in Pierson's handwriting, contained in his trial counsel, Marcus Paine's file, in the possession of Mr.

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[2] The trial of his co-defendant, Timothy Pierson, was severed and tried in February 1995.

[3] In finding at his sentencing Mr. Plunk had obstructed justice by testifying at Mr. Pierson's sentencing hearing, District Court mischaracterized his testimony, stating Mr. Plunk had affirmatively represented the initial meeting between himself, Mr. Pierson and Mr. Malca was "completely innocuous and legitimate." See U.S. v. Plunk, Case No. A94-0036 CR (JWS). On the contrary, Mr. Plunk never represented he himself was unaware of the illegality of the meeting, but only there were no blatant, outward representations to Mr. Pierson illegal activities were being discussed. Judge Sedwick found Mr. Plunk obstructed justice, although he did not find Pierson obstructed justice, even though Judge Sedwick specifically stated, at Mr. Plunk's sentencing hearing, he had found Pierson lied when he sentenced him.

Pierson's appellate counsel, Kevin McCoy, were not provided to Mr. Plunk's counsel, despite their value as impeaching evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)[App. 118; 121, 123].

His charges were first dismissed by the U.S. District Court pre-Cretacci, reinstated on interlocutory appeal in United States v. Plunk, No. 94-30421 and 94-30422 ("Plunk I") and a petition for certiorari was denied in United States v. Plunk, 517 U.S. 1188 (1996); his conviction was affirmed on direct appeal in United States v. Plunk, 153 F.3d 1011, (9th Cir. (Alaska) Aug. 28, 1998) ("Plunk II") and certiorari affirmed in United States v. Plunk, 526 U.S. 1060 (1999). His post-conviction relief habeas corpus petitions were denied in the district court and the 9th Circuite denied a certificate of appealability in United States v. Plunk, Case No. 62-35573 on November 27, 2002 ("Plunk III") and certiorari was denied on May 27, 2003 Gerald Frank Plunk v. United States, No. CV-00-00093 (JWS), cert. den'd, No. 02-1544 (2003). This instant matter is in fact "Plunk IV."

2. U.S. District Court for the District of Alaska In Personam Punitive Forfeiture Proceedings

Criminal search and arrest warrants resulted in the search of Mr. Plunk's home and physical arrest, based on an affidavit of DEA Agent Cayford of 3/22/94 (hereinafter "Cayford Affidavit") i.e. same evidence as to same criminal offenses serving as basis for Mr. Plunk's criminal conviction and punitive, in personam forfeitures of his property. Items taken from home at search, and watch stripped from his person at arrest, were subject of four in personam administrative forfeitures which constituted punishment based on said same probable cause and offenses for which he was subsequently tried, convicted and sentenced. Due to tactical decision to institute parallel and serial in personam punitive

forfeitures and criminal indictment for the same alleged offenses, including a criminal 21 U.S.C. § 848 and/or § 853 forfeiture count, Mr. Plunk and his counsel were faced with "Hobson's choice," i.e., "faced a battle on two fronts" and thus due to state of law that there was (and still is) no "use immunity" regarding incriminating claims of ownership as to forfeitures were forced to preserve Mr. Plunk's fifth amendment privileges by foregoing formal claim of ownership or defense to in personam punitive administrative forfeitures [App 89; 94; 103-113].

At time of such forced decision, to wit, preserving one basic constitutional right (self-incrimination) by foregoing others (due process and right to be free from punitive forfeiture and punishment), no ruling of the United States Supreme Court or circuits had authorized any type of "limited use immunity" under the doctrine of Simmons v. United States, 88 S.Ct. 967 (1968) as to potentially incriminating claims of ownership made by property owner and defendant in punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881.

To achieve such punitive "purpose or effect," the Government simultaneously brought criminal indictment, criminal forfeiture and in personam administrative forfeiture actions under 21 U.S.C. § 881(b)(1), 21 U.S.C. § 853(a) and (j), and 19 U.S.C. § 1602, et seq., against certain of Mr. Plunk's personal property, valued at approximately $16,167.89, and by utilizing the tactical "Hobson's choice" obtained summary forfeiture. This was based on same facts alleged and offenses set out in the 3/22/94 Cayford Affidavit.

As a result of administrative in personam forfeitures, Mr. Plunk moved to dismiss criminal indictment, alleging double jeopardy violation (Exc. 0059). Magistrate Judge John Roberts, and District Court Judge John W. Sedwick, granted Defendant's motion in part, holding Government's administrative forfeitures were punishment, and criminal

prosecution therefore violated double jeopardy clause.[4] Government filed interlocutory appeal (C.A. 9th No. 94-30421), and Defendant cross-appealed (C.A. 9th No. 94-30422).[5]

After such partially successful jeopardy challenges, and cross interlocutory appeals by defendant and government, a Ninth Circuit panel, in previously unpublished opinion in the instant case entitled United States v. Plunk, No. 94-30421 and 94-30422, 95 WL 619299 (9th Cir. October 17, 1995), cert. den'd 517 U.S. 1188 (1996) (hereinafter "Plunk I"), applied United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), cert. den'd 116 S.Ct. 2528 (1996), which approved a totally unforeseen and unprecedented "use immunity" rule for ownership claims as to forfeitures, and did so retroactively to Mr. Plunk, although it was subsequently disavowed in United States v. Scrivner, 18 F.3d 825 (9th Cir. 1999). Plunk I panel incorrectly stated Mr. Plunk had not been "punished" since he had impliedly "abandoned" the property in face of punitive forfeiture due to forced failure to file a claim [App. 10-26].

Plunk I court thus avoided "Hobson's choice" issue, prior to Supreme Court's decision in United States v. Ursery,

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[4]Basis for Magistrate Judge Roberts and Judge Sedwick's ruling on double jeopardy was United States v. $405,089.23 United States Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995, [subsequently reversed sub. nom. United States v. Ursery, 116 S. Ct. 2135 (1996).]

[5] Judge Sedwick held that prosecution for Conspiracy charged in Count 1 and distributions charged in Counts 9, 10 and 11 was precluded by double jeopardy, but erroneously held prosecution for CCE and telephone counts were not, because he incorrectly concluded they were not lesser included offenses, misapplying Jeffers v. United States, 432 U.S. 137 (1977). Mr. Plunk cross-appealed on this point.

supra, notwithstanding no court had ruled pre-Cretacci, (or has since) Simmons limited use immunity extended to claim of ownership or defense in forfeiture action.

After United States v. $405,089.23 was reversed by Ursery, different Ninth Circuit panel disavowed Cretacci in Scrivner refusing to follow it, holding it mere dicta and defendant therein could be convicted as the claims of ownership were non-privileged and with no such "Simmons use immunity."

Thus, but for brief "Certacci/Plunk I" window there was not, and is not, any such "use immunity" for ownership claims in forfeiture, to wit classic "Hobson's Choice." After referenced in personam administrative forfeiture proceedings, and punishment, the government brought in U.S. District Court in personam civil forfeiture proceedings pursuant to the provisions of 21 U.S.C. § 881 (a)(6) and/or 18 U.S.C. § 981 (a)(1)(A) and criminal forfeiture proceedings (in the criminal indictment) under 21 U.S.C. §§ 848 and 853 in attempt to forfeit following additional property:

1) One heat sealed bag of approximately $5,000 in U.S. currency;

2) $50,000 in U.S. currency;

3) 1967 U206B Cessna No. N4994F;

4) 1964 Cessna No. N5217U;

5) 1975 SUPERCUB, PA-18, IDENTIFICATION # N454 B;

6) 1986 ARROW GARE SEAHAWK, IDENTIFICATION # N76 KD;

7) The real property at T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182;

8) 12.32 acres of real property at Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1, Lot 10 Block 1, Lot 11 Block 1, Lot 7 Block 6;

9) .60 acres of real property at Rabbit

Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon [App. 2].

On September 8, 1994, the Government had previously filed U.S. District Court in personam complaint for forfeiture against Mr. Plunk as to four airplanes,[6] some used at Big Mountain Lodge, arising out of same criminal investigation, alleging Mr. Plunk was registered owner of aircrafts, based on affidavit of DEA Agent Cayford of 9/8/94 (i.e., basically the same affidavits as for Mr. Plunk's arrest, search of his home, and administrative forfeitures). That action was initially entitled United States v. Four Aircraft, No. A94-401 CIV, subsequently consolidated with United States v. Twelve Pieces of Property, No. A96-335 CIV, referred to herein. No. A94-401 CIV was stayed on motion of government pending criminal trial and resurrected over Mr. Plunk's objection after Mr. Plunk's conviction [App. 126-132].

Four aircraft subject of A94-401 CIV were also specified by government in a bill of particulars (with other instant property) to be subject of criminal indictment and trial of 21 USC §§ 848 and 853 CCE forfeiture counts in United States v. Plunk, No. A94-036 CR, as to much of which property court granted judgment of acquittal. After said judgment of acquittal the government then filed against non-aircraft property in A96-335 CIV (again based largely on the information and offenses in Cayford affidavits of 3/22/94 and 9/8/94), and A94-401 CIV and A96-335 CIV were consolidated.

As noted, prior to and/or and simultaneous to criminal prosecution and certain of instant U.S. District Court forfeiture proceedings Government brought in personam punitive civil administrative forfeiture actions under 21

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[6] That is, certain of the aircraft which are the subject of this writ of certiorari.

U.S.C. § 881(b)(1), 21 U.S.C. § 853(a) and (j), and 19 U.S.C. § 1602, et seq., against certain of Mr. Plunk's personal property, valued at approximately $16,167.89, seized on March 24, 1994, during search of Mr. Plunk's residence and/or from his person on March 25, 1994, at his surrender and arrest, including cash, gold, guns, and a Rolex watch removed from his wrist, all of which government claimed were proceeds of illegal drug transactions. Said properties were subsequently declared summarily forfeited in June and August of 1994, pursuant to punitive in personam declarations of forfeiture under 21 U.S.C. § 881 and 19 U.S.C. § 1602 et seq., listing Gerald Frank Plunk as the "Owner" of said properties. Mr. Plunk could not enter a formal claim for said properties due to "Hobson's Choice," that is, exercising his right to counsel as to necessity to preserve his Fifth Amendment rights in simultaneously ongoing criminal prosecution, forfeitures[7] [App. 134-143].

Moreover, in criminal trial, government likewise failed to show proof of forfeiture as to many of properties subject of the instant writ of certiorari, which were the subject of the 21 USC §§ 848 and 853 CCE forfeiture counts as set out in indictment and/or in bill of particulars. On November 15, 1996, the Honorable John W. Sedwick, United States District Court Judge, issued an Order from Chambers (Re: Motion

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[7] As to instant forfeitures, Mr. Plunk, through counsel, in both A96-335 CIV and A94-401 CIV, repeatedly objected to Hobson's choice, sought stays and/or specific rulings regarding "Simmons/Cretacci" immunity to protect Fifth Amendment rights, objected on Fifth and Sixth Amendment and double jeopardy and due process grounds, and due to prior in personam punitive administrative forfeitures, criminal trial and conviction, and judgment of acquittal, all requests to no avail, as they were opposed by government, and denied by court.

for Judgment of Acquittal - Dockets 382/403) which held defendant Gerald Frank Plunk in the case of United States of America v. Gerald Frank Plunk, et al., Case No. A-94-36 CR (JWS), was "entitled to a judgment of acquittal as to the forfeiture of the Cabin, Tract A, the Inlet View Lots, the Rabbit Creek Lot, the Sky Harbor Lot, and the Aircraft."

The District Court held the government, in criminal case against Mr. Plunk, had not met requisite evidentiary standard to support forfeiture of property listed above, due to fact government was unable to establish requirements of 21 U.S.C. § 853(d)(1) and (2) by preponderance of evidence. (See also United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989.) At that time, the Court concluded its Order would bar subsequent civil forfeiture proceedings by government against aircraft based on res judicata, and a presentation of defense of issue preclusion [App. 14].

Not satisfied with first jeopardy bite of apple (in personam administrative forfeitures) or second jeopardy bite (in personam criminal conviction and sentencing of Mr. Plunk) or unsuccessful third jeopardy bite of apple (their failure to obtain in personam criminal forfeiture of the instant subject proceedings at criminal trial), government then filed Action No. A96-335 CIV[8] as to non-aircraft properties which (like the aircraft) had been subject of their subsequently unsuccessful attempts to obtain forfeiture at the criminal trial, and consolidated same with the pending Action No. A94-401 CIV, i.e., the in personam punitive civil aircraft forfeitures.

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[8] Again, this was based largely on the same evidence and/or subsequently obtained evidence, which later evidence would be precluded by United States v. $405,089.23 United States Currency, 122 F.3d 1285 (9th Cir. 1997) and United States v. $191,910 United States Currency, 16 F.3d 1051 (9th Cir. 1994).

However, following motions to dismiss instant civil forfeiture actions against defendant properties and oral argument supporting and opposing the motions, United States District Court issued a subsequent Order from Chambers on May, 19, 1997 (Re: Motion to Dismiss-Docket 44). In this Order, the Court amended previous Order of November 15, 1996, which held the government would be precluded from initiating civil forfeiture proceedings against defendant properties pursuant to issue preclusion principles of res judicata [App. 21-23].

Order of May 19, 1997, addressed dilemma faced when ruling on Defendant's motion to dismiss government's attempt at civil forfeiture of the defendant aircraft. The court noted the government had failed to present evidence in criminal case against Mr. Plunk sufficient to show probable cause to forfeit defendant aircraft: Court knew the government in fact did not present evidence at trial sufficient to show probable cause to forfeit that property embraced by the pending motions [i.e., the real property and aircraft, with the exception of the $5,000 and $50,000], although there was no specific finding to that effect in the criminal case and judgment of acquittal did not necessarily constitute such a finding.

Moreover, Court failed to recognize as to most property, requisite specific nexus, via evidence in government's possession at time of seizures, was not shown. See $405,089.23 and $191,910 (discussed infra).

Court refused to recognize jeopardy bar to such instant forfeitures from prior administrative forfeiture, intervening trial and conviction, or judgment and acquittal as to certain properties in criminal action .

On July 15, 1998, Mr. Plunk and counsel still suffered the "Hobson's choice" regarding right to remain silent and Fifth Amendment vis-à-vis Mr. Plunk's desire to defend as to criminal charges on appeal. Government, [as they

subsequently conceded as to much of the forfeited property when they settled with Mr. Plunk and paid damages mid-appeal,] did not and could muster proof as required. Yet, the United States District Court denied Mr. Plunk's renewed request for a stay, granted government's motion for summary judgment regarding forfeiture of above-listed property. On August 26, 1998, U.S. District Court Judge signed government's submitted Final Decree of Forfeiture [App. 53].

While in Plunk IV the government confessed error mid-appeal as to the 1986 Arrow Gare Seahawk, 1967 U206B Cessna, 12.32 acres of property, .60 acres of unimproved property, and a 1964 206 Cessna (and paid damages of approximately $350,000), [App. 48-49] and Ninth Circuit reversed due to lack of probable cause as to the Hock Lake Property and the 1975 SuperCub and remanded, they affirmed as to the $5,000.00 in a heat-sealed package, $50,000.00 substituted for the Big Mountain Lodge [App. 2, 46-47].

Accordingly, Mr. Plunk was repeatedly forced to "run the gauntlet," i.e., "fight a war on numerous fronts," where government gained significant tactical advantage by splitting its causes of action, which, in reality, have been from the outset in personam punitive punishment as to Mr. Plunk and his property within meaning of United States v. Ursery, 116 S.Ct. 2135 (1996).

Such procedure violates Mr. Plunk's rights to due process and effective assistance of counsel under the United States Constitution, including the Fourth, Fifth and Sixth Amendments, and to be free from double jeopardy, including his historical rights to be free from being forced to "wage a war on multiple fronts."

By gaining such tactical advantage, utilizing the "Hobson's choice," i.e., precluding Mr. Plunk and counsel from effectively defending against any forfeitures via testimony by Mr. Plunk or providing meaningful discovery,

etc., government obtained punishment of Mr. Plunk within meaning of double jeopardy clause; accordingly, all criminal punishment or sentencing of Mr. Plunk or forfeiture of his properties post initial punitive in personam administrative forfeitures, and certainly post-criminal trial, are jeopardy barred.

VIII. REASONS FOR GRANTING CERTIORARI.

A. Government May Not Force a Defendant to Forego Protection Under the Fifth Amendment of the United States Constitution to Preserve Other Constitutional Rights.

The Fifth Amendment right against self-incrimination protects a claimant in civil forfeiture proceedings initiated by the government and said right may be exercised via advice of counsel under the Sixth Amendment. While the government asserted in this case it met its burden of showing probable cause for forfeiture of the defendant properties, nonetheless, it further successfully argued claimant Mr. Plunk cannot raise his Fifth Amendment privilege if he is to rebut government's claims.

The Ninth Circuit Court of Appeals has held "forfeiture statutes are deemed criminal for the purpose of protecting rights secured by the Fourth and Fifth Amendments . . . ." United States v. One 1970 Pontiac GTO 2-Door Hardtop, 529 F.2d 65, 66 (1976). The Ninth Circuit was referring specifically to the Fifth Amendment protection from self-incrimination, citing United States Supreme Court decision in Boyd v. United States, 116 U.S. 616 (1986) which dealt exclusively with that clause of the Fifth Amendment in civil forfeiture proceedings.

In later case decided by United States District Court of Oregon, court reiterated "quasi-criminal" nature of

forfeiture actions, United States v. $75,040.00 in United States Currency, 785 F. Supp. 1423, 1425 (D.Or. 1991), holding it could not force claimant to waive his Fifth Amendment privilege, but court would not be prevented from "drawing a negative inference against a party to a civil action who refuses to testify, but only, *in response to probative evidence offered against him.*" United States v. $75,040.00, at 1429 (quoting Baxter v. Palmigiano, 425 U.S. 308, 318-319 (1976) (emphasis added.)

Government in this case (as they subsequently conceded and/or the 9th Circuit held) offered no adequate probative evidence to support showing of probable cause for forfeiture of most of defendant properties, but simply took tactical advantage of Mr. Plunk at the administrative forfeiture level and then in United States District Court, by making initial discovery requests, in response to which claimant Mr. Plunk invoked his Fifth Amendment privilege for his protection prior to a final resolution of the criminal charges against him so as to allow government gain further tactical advantage via the "Hobson's choice."

B It Violates Fundamental Fairness and Due Process of Law to Force a Defendant to Forego a Defense to Punitive Administrative Forfeitures to Preserve Fifth Amendment Privileges Based Upon Existing Law [i.e., Existing Case Law Interpretation and Restrictive Application of "Limited Use Immunity" under Simmons v. United States, 390 U.S. 377 (1968),] or not applying to claim of ownership in forfeiture and then, Based Upon a Temporary Change in the Law by One Three Judge Ninth Circuit Panel, [i.e., United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert den'd, 518 U.S. 1007 (1996), which was Subsequently Disavowed As Dicta by Another Three-Judge Ninth Circuit Panel in United States v.Scrivner,

189 F.3d 825 (9th Cir. 1999),] and Hold a Defendant to a Duty of "Clairvoyance" as to Such Shift in the Law, So As to Imply a Knowing Waiver to Retroactively Deny Double Jeopardy Protection Notwithstanding Prior Punishment.

There is no question but that record demonstrates government made tactical choice to seek punitive in personam punitive civil forfeitures against Mr. Plunk and his property at time he was facing criminal indictment, and even after trial and conviction, while on appeal, so as to present him and counsel with "Hobson's choice" and "force a fight on two fronts." The foundation of Fifth Amendment prohibition against such a government tactics and parallel or successive prosecutions which are barred by double jeopardy traces its origins to Greek and Roman law. See United States v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995); and United States v. Ursery, 116 S.Ct. 2135 (1996).

The record clearly demonstrates from outset Mr. Plunk and his property have been subject of tactical punitive and serial in personam forfeitures and penalties within meaning of United States Supreme Court's ruling in United States v. Ursery, supra [App. 10-32].

Ursery Court made two unequivocal statements in holding, namely: (1) forfeiture penalties which are "punitive" in "purpose or effect" are in personam and are distinct from in rem civil forfeitures which are purely remedial," and accordingly, such in personam punitive actions give rise to double jeopardy bar; and (2) even some nominally "in rem" civil forfeitures would constitute "punishment" within meaning of double jeopardy clause bar to further prosecution, "where the 'clearest proof' indicates that an in rem civil forfeiture is so punitive either in purpose or effect' as to be equivalent to a criminal proceeding...." Ursery at 2148, n.3

(emphasis added). The "clearest proof" exists as to Mr. Plunk and his property.

Nonetheless, court in United States v. Plunk, 94-30421 (Plunk I), United States v. Plunk, 153 F.3d 1011(9th Cir. (Alaska) Aug. 28, 1998) (Plunk II), United States v. Plunk, A94-0036 CR (JWS) (Plunk III) and United States v. Twelve Pieces of Property, et al., No. 98-35702 (Plunk IV) failed to follow Ursery.

While panel's opinion in Plunk II recognized this language from Ursery at 153 F.3d 1030 and acknowledged these two clear teachings of Ursery, court refused to rule on Mr. Plunk's argument that "factually, tactically, statutorily, and procedurally, the subject administrative forfeitures...were in fact in personam criminal forfeitures tactically directed at [him] to punish him." Plunk II at 153 F.3d 1030.

Panel in Plunk II improperly stated at 153 F.3d 1029 consideration of Mr. Plunk's Ursery double jeopardy claims were barred by decision in United States v. Plunk, Nos. 94-20421, 94-30422 and 1995 WL 619299 (9th Cir. Oct. 17, 1995), cert. denied 517 U.S. 1188 (1996) (Plunk I), wherein court had mistakenly found under United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), Mr. Plunk's coerced decision to forego filing an administrative claim and contesting civil forfeitures to protect his Fifth Amendment privilege in pending criminal case meant property was "abandoned," "the forfeiture of Plunk's abandoned property was not a 'punishment,' and thus Plunk was not placed in jeopardy."

This language in Plunk II, which served as basis of U.S. District Court and the Ninth Circuit to deny habeas corpus relief in Plunk III, is misapplication of law of the case doctrine, ignores effect of Ursery on Plunk I and Cretacci, and further, overlooks material facts concerning in personam punitive nature of the forfeitures and resulting "Hobson's choice." At the time of court's ruling in Plunk I, relevant law in the Ninth Circuit as to double jeopardy implications of civil

forfeitures was United States v. $405,089, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995). United States v. Ursery, 116 S.Ct. 2135 (1996), clarified such law. In Ursery, while Court reversed lower court in Ursery and $405,089.23, this Court clearly distinguished between in personam punitive forfeitures, holding such forfeitures which were clearly "punitive" in either "purpose or effect" did invoke the double jeopardy clause as opposed to in rem civil forfeitures which were purely remedial and did not do so. The Court held squarely even civil forfeitures could be punitive and thus in personam where there was such proof of the purpose or effect, as in the instant case. See Ursery at 2148, n.3.

Cretacci and Plunk I, II and III panels denied double jeopardy protection under transparent subterfuge there had been voluntary "abandonment" of property in punitive administrative proceedings, notwithstanding under then-existing case law, i.e., the "limited use immunity" Simmons afforded potentially incriminating statements and claims of ownership made to convey standing in Fourth Amendment suppression motions, gave no such protection for a property owner claiming incriminating property in a punitive administrative forfeiture proceeding [App. 98-113].

This patently frivolous and unsupported claim of "waiver" and "abandonment" cannot be said to be founded on any evidence of a "knowing" or "voluntary" relinquishment of any constitutional right. See Johnson v. Zerbst, 304 U.S. 458, (1963). Via such judicial "sleight of hand" the Plunk I panel avoided the Ninth Circuit holding in United States v. $405,089.23, supra, and now the Plunk II and Plunk III panels have avoided the doctrine enunciated in n.3 in Ursery that punitive in personam forfeiture conveys protection of a jeopardy bar to subsequent prosecution or punishment.

Not only is such extension of Simmons use immunity ill-advised in terms of policy considerations for courts, but it

is not clear such Simmons "limited use immunity" will in fact be afforded in future to defendants the Ninth Circuit, or other circuits, since Cretacci was the first case to so rule and many other circuits have not yet adopted such an ill-advised, unprecedented doctrine.[9] From a practical and policy view, many troubling questions exist as to the wisdom, scope, and application of such use immunity. Does it apply to mere use, or derivative use? What procedures apply to prevent taint to subsequent prosecutions? How does one build the proverbial "Chinese Wall" and what procedural hearings, safeguards, etc. are mandated and who has the burden of proof to show taint or lack of taint?

It is clear not only was Mr. Plunk punished before his criminal trial by punitive in personam forfeitures of his property directed against him in a personal fashion, but he likewise suffered such punishment after his criminal trial, while his criminal appeal was pending, notwithstanding his criminal conviction and sentence and a successful judgment of acquittal as to the criminal forfeitures in the criminal trial.

To allow this procedure to exist means the government can continue to gain tactical advantage and inflict punishment on defendants who cannot defend themselves or their property by instituting in personam punitive forfeitures as to potentially incriminating property, secure in the knowledge that any competent defense counsel and defendant, until an acquittal or final resolution of a merit appeal, must forego making administrative forfeiture claims

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[9] Moreover, the Ninth Circuit has now cynically and conveniently disavowed Cretacci in Scrivner, refusing to follow it, holding such language as to use immunity is "mere dicta," and allowing a conviction for possession of a machine gun and an unregistered firearm based on a claim of ownership in a forfeiture proceeding United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999).

or interposing a defense (as Scrivner and his attorney should have done) and thus suffer forfeiture. The government can then claim "abandonment" or "waiver" and avoid the underlying teachings of Ursery.

Further, even if Cretacci, supra, is viewed as good law, Cretacci dealt with in rem remedial civil forfeitures, not in personam punitive civil forfeitures which were instituted as a tactical ploy by government.

Where a matter is in personam as opposed to remedial civil in rem proceedings, and thus punitive, burden should remain on government and never shift, and defendant should be allowed to defend himself based upon presumptions of innocence, relying on Fifth Amendment privilege.

Defendant must be able to stand silent and avoid self-incrimination, without affirmative duty to incriminate himself to avoid a "waiver" or "abandonment" argument.

This forced Mr. Plunk and counsel to "fight on two fronts" and face "Hobson's choice" of tactical hardship, i.e., suffer punitive forfeiture of property or preserve Fifth Amendment privileges.

There was (1) no voluntary abandonment of property; (2) no waiver of double jeopardy claim; and (3) a clear "purpose and effect of punishment" under Ursery, such that in personam focus of the forfeitures constituted double jeopardy punishment.

C. Government's Tactical Decision to Force a Defendant to Face Parallel 21 U.S.C. § 841 et seq. Criminal Drug Prosecution and Forfeitures and Punitive 21 U.S.C. § 881 Civil Forfeitures Based on the Same Offenses Forces the Defendant to Face an Unlawful "Hobson's Choice" which is Violative of the Doctrines of Fundamental Fairness, Due Process, Rights Against Self-Incrimination and to Counsel, and Double Jeopardy.

Given obvious in personam nature of the initial administrative forfeitures and continuing tactical ploy of government to take advantage of Mr. Plunk via "Hobson's Choice," double jeopardy precludes any post-administrative forfeitures of Mr. Plunk's property or criminal punishment or post-trial forfeitures of Mr. Plunk's property.

Present forfeiture proceedings (as were the post-administrative forfeiture criminal trial and sentencing) are jeopardy barred both by said prior administrative forfeitures as in personam forfeiture proceedings as opposed to in rem proceedings and as such are punitive and subject to double jeopardy as well as by the criminal trial [App. 126-132].

In U.S. v. Ursery, 116 S.Ct. 2135 (1996), this Court reversed the Sixth Circuit's decision in U.S. v. Ursery, Case No. 95-345, and the Ninth Circuit's decision in U.S. v. $405,089.23, because administrative forfeitures at issue were "in rem civil forfeitures" "neither punishment" nor criminal for purposes of the Double Jeopardy Clause." Ursery at 2149.

The decision distinguished such in rem civil forfeitures as non-punitive, due to their remedial purpose, and due to fact they did not tactically focus on punishment of person in contrast to "in personam civil or criminal penalties." Supreme Court cited basic distinction recognized between "in rem civil forfeiture proceedings," which were not punitive and characterized as remedial and against property, and "in personam civil or criminal penalties" which are tactically directed against a person (i.e. Mr. Plunk) and are punitive and thus invoke the double jeopardy clause as enunciated in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). Ursery Court likewise relied on basic distinction, as set out One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curium) and Various Items of Personal Property v. United States, 282 U.S. 577 (1931), between in rem civil forfeiture proceedings as against the property

(remedial and non-punitive), and in personam proceedings directed against the person i.e. Mr. Plunk (punitive and thus protected by double jeopardy).

In n.3 in Ursery at 2148, this Court recognized even an in rem civil forfeiture which was "so punitive whether in purpose or effect" as to be "equivalent to a criminal proceeding . . . may be subject to the Double Jeopardy Clause (citing United States v. One Assortment of 89 Firearms, at 1105).

In the instant matter, factually, tactically, statutorily, and procedurally, instant U.S. District Court forfeitures and subject prior administrative forfeitures, which Judge Sedwick properly found were based upon the criminal conduct resulting in Mr. Plunk's conviction, are in fact in personam criminal forfeitures in purpose tactically directed at the person of Mr. Plunk to punish him, and it follows Mr. Plunk is entitled to protection of Double Jeopardy Clause precluding further punishment for same.

Administrative seizures and forfeitures of the property, and the instant U.S. District Court seizures/forfeitures were pursuant to search warrants based upon the affidavits of 1994 and 1996, which were largely identical [App. 75]. Administrative notices of seizures were issued as conscious punitive tactical ploy by government, to gain procedural benefits of 19 U.S.C. § 1602 et seq., as to lesser standard and burden of proof, and "Hobson's Choice" presented by resulting threat to Mr. Plunk's Fifth Amendment rights after Mr. Plunk was indicted for such underlying criminal conduct and/or contemporaneous with grand jury proceedings for same.

In addition, despite district court's ruling in Plunk III, in light of "contrary intervening controlling authority," the "law of the case" excuse can no longer be used. In United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999), the Ninth Circuit has now clearly retreated from Cretacci, treating the

so-called "implied Simmons use immunity" holding, which was the cornerstone of the Plunk I and Plunk II holdings regarding the purported "abandonment" of the property or "waiver" of double jeopardy rights, as mere dicta and not good law. Scrivner, 189 F.3d at 828. In Scrivner, court ruled in fact a defendant faced with such a "Hobson's choice" made a potentially incriminating claim of ownership in a forfeiture proceeding at his peril, there was no "Simmons use immunity," and admissions could be used against him in a criminal proceeding to support a conviction.

Thus, Cretacci, upon which Plunk I relied, has been abandoned, and Scrivner decision constitutes contrary intervening controlling authority. Accordingly, any reliance by district court in Plunk III on the "law of the case doctrine" was erroneous.

D. A Defendant Who Suffers Punitive In Personam Forfeitures of His Property Can Not Be Placed in Jeopardy of Subsequent Prosecution and Punishment, Nor Can He Suffer Subsequent In Personam Forfeitures.

It was and is patently unfair and violates Fifth Amendment, due process, and double jeopardy to continue to force a defendant to "fight on two fronts," "face the Hobson's choice," and not be allowed to testify in the instant matter without jeopardizing his rights with the criminal matter is pending. Accordingly, district court should not have granted summary judgment, or final judgment of forfeiture, and should have ruled further efforts of government to forfeit the property are barred by principles of res judicata, collateral estoppel and double jeopardy.

Given the procedural and substantive history of the case there is no question but that basic forfeiture in this matter is "in personam," that is, a punitive criminal forfeiture

found against Mr. Plunk, as was the forfeiture of items previously forfeited as a result of the criminal investigation and search warrant and arrest, including the Rolex watch, firearms and gold. The forfeiture of those items is sufficient to invoke the doctrine of double jeopardy insofar as those forfeitures are likewise in personam and constituted the initial proceedings by the Government as to which it should have the first and only "bite at the apple."

E. The Forfeitures in Question Were Factually, Tactically, Statutorily, and Procedurally, In Personam and Punitive and Focused on Mr. Plunk.

Substantively and Procedurally the Administrative Forfeitures, that are the subject of this writ of certiorari, are in personam, punitive, and focused on Mr. Plunk

United States v. Ursery, 116 S.Ct. 2135 (1996), reversed Sixth Circuit in United States v. Ursery, Case No. 95-345, and Ninth Circuit in United States v. $405, 089.23, Case No. 95-346, precisely because administrative forfeitures at issue were "in rem civil forfeitures" and thus "neither punishment" nor criminal for purposes of Double Jeopardy Clause." Ursery at 2149.

The decision clearly distinguished such in rem civil forfeitures as non-punitive, due to their remedial purpose, and the fact they focused on punishment of the property as opposed to the person in contrast to "in personam civil or criminal penalties" citing the basic distinction recognized between "in rem civil forfeiture proceedings", which were not punitive and are characterized as remedial and against the property, and "in personam civil or criminal penalties" which are directed against a person and are punitive and thus invoke the double jeopardy clause as enunciated in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The

Ursery Court likewise relied on basic distinction, set out of One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curium) and Various Items of Personal Property v. United States, 282 U.S. 577 (1931), between in rem civil forfeiture proceedings as against the property (remedial and non-punitive), and in personam proceedings directed against the person (punitive and thus protected by double jeopardy).

Moreover, the Ninth Circuit panel in Plunk II, at 153 F.3d 1030, conceded the Ursery court had held "even some in rem civil forfeitures could constitute 'punishment' for double jeopardy purposes," acknowledging clear language by Ursery court in n.3 at 518 U.S. 289 that "[w]here the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause [citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)]."

Accordingly, when one recognizes that factually, tactically, statutorily and procedurally, the subject administrative forfeitures in the instant matter, which Judge Sedwick properly found were based upon the criminal conduct resulting in Mr. Plunk's conviction, were in personam criminal punitive forfeitures strategically directed at the person of Mr. Plunk to punish him, it follows Mr. Plunk and his property is entitled to the protection of the Double Jeopardy Clause precluding further punishment for same [App. 165-203].

To realize administrative forfeitures in question were in personam and a tactical choice by government directed against Mr. Plunk to punish him, as opposed to in rem against the properties, it is necessary to recognize the following. Seizures of the property were pursuant to criminal search warrant and arrest warrant affidavits. Notices of seizures were issued as a conscious punitive tactical ploy by the government, to gain the procedural benefits of 19 U.S.C. §

1602 et seq., as to lesser standard and shifted burden of proof, and "Hobson's choice" presented by resulting threat to Mr. Plunk's Fifth Amendment rights after Mr. Plunk was indicted for such underlying criminal conduct and/or contemporaneous with grand jury proceedings for same.

The planes, and much of the real property, were subject of Judge Sedwick's Judgment of Acquittal as to in personam criminal punitive forfeiture in U.S. v. Plunk, Case No. A94-0036 CR (JWS), which government appealed in Case No. A-96-30349, but then abandoned appeal. Government then re-instituted civil action in No. A-94-401 CIV, and began Action No. A96-335 CIV, to forfeit planes and said property, although they had lost the in personam punitive criminal forfeiture actions in criminal trial.

Having begun criminal search warrant/arrest warrant proceedings against Mr. Plunk, and indicted him, and in light of interplay between the Fifth Amendment rights and forfeitures, and resulting "Hobson's Choice," as a matter of basic due process it is clear the forfeitures in question were in personam punitive forfeitures under 18 U.S.C. § 853(j) and 881(d) and not in rem remedial forfeitures under 21 U.S.C. § 881(b) and (d), which purpose and effect was to punish Mr. Plunk. In essence government "severed," for tactical purposes, portions of forfeiture counts from indictment and proceeded by way of administrative in personam punitive forfeiture, and summary adjudication, and post-conviction civil in personam U.S. District Court forfeitures. Thus government is bound by the double jeopardy bar [App. 146, 163].

The substantive distinguishing factor of Mr. Plunk's case from the pure "in rem" forfeitures of Ursery or $405,089.23 is as follows. Pre-United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) unavailability of use immunity pursuant to Simmons v. United States, 88 S.Ct. 967 (1968), for statements and claims of ownership in forfeiture

proceedings forced Mr. Plunk and his counsel to forego administrative claims precisely due to concerns of jeopardizing his Fifth Amendment and self-incrimination rights. In Ursery, no such Hobson's choice was procedurally present, since civil forfeiture proceedings were instituted prior to indictment. Likewise in $405,089.23, no such Hobson's choice was present, since forfeiture proceedings were instituted after conviction (with no evidence of appeal pending).

Here, it was very nature of tactical decision by prosecution to institute administrative in personam punitive forfeiture proceedings in midst of criminal prosecution that forced Mr. Plunk and his counsel to make the choice. This is precisely why prosecution should suffer double jeopardy bar having elected to "split out" property covered by the 21 U.S.C. § 853(a) forfeiture count in the indictment into 21 U.S.C. § 853(j) administrative in personam punitive forfeiture proceedings, and post-criminal trial (during appeal) in personam U.S. District Court actions. Reality of case, factually, procedurally, legally, and equitably, is forfeiture actions were in personam against Mr. Plunk as owner of property to force him to suffer prejudicial forfeitures preserve his Fifth and Sixth Amendment rights and punish him.

This statutory distinction, includes distinction set out in 21 U.S.C. 881(b), i.e. utilization of summary administrative forfeiture procedures of 19 U.S.C. § 1602 are only authorized under 21 U.S. C. § 853(j) wherein it utilizes 21 U.S.C. § 881(d) for property that has been seized under a criminal search warrant and/or arrest, and thus said forfeitures must be characterized as in personam punitive forfeitures, with attendant double jeopardy consequences, as opposed to property seized under civil process or otherwise, and not such criminal process, which property may be subject to 19 U.S.C. § 1602 summary forfeiture administrative procedures utilizing 21 U.S.C. § 881(b) and (d) and thus

characterized as in rem remedial forfeitures, with non-double jeopardy consequences, and has a sound constitutional, public policy, and statutory basis.

The very fact property is seized under criminal search warrant or arrest pursuant to a criminal arrest warrant, as in instant matter, has serious constitutional implications for defendant, insofar as by virtue of existence of probable cause as set out in the search warrant, or indictment and/or arrest warrant applications, government has focused on the defendant in personam as a criminal defendant target, which in turn has implications for his Fifth Amendment rights should he seek to file and/or assert a non-protected formal claim of ownership for the property. Accordingly, if government utilizes the summary forfeiture administrative procedures of 19 U.S.C. § 1602 with attendant advantages to government of lesser standard and burden of proof, requirement of a formal claim etc., as opposed to the criminal jury trial process of 21 U.S.C. § 853(a), or proceeds post-criminal trial (while on appeal) in in personam punitive civil actions with the "Hobson's choice," the government likewise should be charged with double jeopardy consequences for the in personam nature of such proceedings. It would be a constitutional and legal fiction to claim, that having proceeded with a criminal search warrant or criminal arrest warrant, the focus is "remedial", i.e., in rem against the property as opposed to "punitive", i.e., in personam against the defendant, to wit Mr. Plunk.

Judge Sedwick's rulings allowed government to proceed, notwithstanding its loss in in personam criminal forfeiture actions, due to different burden and standard of proof required in in personam criminal forfeiture to raise a rebuttal presumption of forfeitability, i.e. preponderance of the evidence, as opposed to probable cause.

Having availed themselves of this lesser standard of proof in the administrative in personam civil forfeiture actions

against the gold, guns, jewelry, and watch, and having further availed themselves of the benefit of the "Hobson's" choice to obtain summary punitive in personam forfeiture, and having failed at the criminal trial regarding forfeiture (i.e., suffering a judgment of acquittal) the government must likewise suffer the burden, namely, the double jeopardy bar. In short, once the criminal search warrant was obtained, the indictment was obtained, the arrest was made, and the seizures were pursuant to same, the forfeitures in question were clearly in personam punitive forfeitures directed against Mr. Plunk to punish him and not in rem remedial actions against the property. Having successfully obtained such in personam punitive administrative forfeitures of certain of the property due to its tactical procedural ploy of severing the in personam forfeiture counts as to said property by the utilization of 21 U.S.C. § 853(j) to institute and obtain 19 U.S.C. § 1602 et seq. administrative forfeitures, the government is likewise saddled with the burdens of its success, i.e. the double jeopardy bar.

The government may well now regret its choice and its hollow success in obtaining in personam punitive forfeiture and punishment of Mr. Plunk by virtue of such administrative forfeitures and its failure to obtain forfeiture at the criminal trial, but it is nonetheless chargeable with same and a double jeopardy bar applies.

The "bottom line" is that the government, having made its initial decision to proceed by way of in personam forfeiture of Mr. Plunk's property seized from his person and his home under a criminal arrest warrant and criminal search warrant so as to gain a procedural benefit and tactical advantage via the "fight on two fronts" and the resulting "Hobson's choice," and having obtained its "first bite at the apple" (in personam forfeitures and punishment), and then having convicted Mr. Plunk, but failing to obtain criminal forfeiture, is now precluded by the double jeopardy clause from seeking any further criminal prosecution or punishment

of Mr. Plunk, or forfeiture of his property, having in retrospect decided that the "first bite" (or even the "second bite") was not sufficient.

In conclusion it is clear, both factually and legally, due to nature of seizures, basis for seizures, timing of indictment, seizures, notices and forfeitures, the administrative forfeitures in question were a tactical choice by the government under 21 U.S.C. § 853(j), incorporating the provisions of 21 U.S.C. § 881(d), in turn incorporating provisions of 19 U.S.C. § 1602 et seq. and as such were, in both purpose and effect, in personam criminal punitive forfeitures directed at Mr. Plunk.

IX. SUMMARY AND CONCLUSION.

The forfeitures of Mr. Plunk's property were tactically, factually, statutorily and procedurally directed at him in personam, based on the same evidence and offenses for which he was facing indictment and trial, and instituted for strategic reasons so as to gain procedural advantage, "force a fight on two fronts," and present Mr. Plunk with a "Hobson's choice." In light of Ursery, given the "purpose and effect" of the initial administrative forfeitures were punitive and in personam, double jeopardy precludes the subsequent criminal prosecution, conviction, or sentence and punishment of Mr. Plunk, or subsequent punitive in personam forfeiture of his property. The Court should grant Certiorari and reverse.

Respectfully submitted this 16th day of September, 2003.

Phillip Paul Weidner, Counsel for Petitioner

Supreme Court, U.S.
FILED

03 519 SEP 16 2003

(2)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

TWELVE PIECES OF PROPERTY ET. AL.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PJ Appendix to Petition for Writ of Certiorari RI

WEIDNER & ASSOCIATES, INC.
Attorneys for Petitioner

By: Phillip Paul Weidner
Phillip Paul Weidner
Attorney of Record

330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

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BEST AVAILABLE COPY

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FILED
JUN 18 2003
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES, T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, et al., Defendant, and GERALD FRANK PLUNK, Defendant–Appellant.	No. 98-35702 DC# CV-96-00335-JWS District of Alaska, Anchorage ORDER

Before: BEEZER, GOULD and BERZON, Circuit Judges.

Defendant-Appellant's petition for rehearing is DENIED.

FILED
JAN 10 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES, T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, et al., Defendant, and GERALD FRANK PLUNK, Defendant–Appellant.	No. 98-35702 DC# CV-96-00335-JWS MEMORANDUM* ORDER

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES, T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, et al., Defendant, and GERALD FRANK PLUNK, Defendant–Appellant.	No. 98-36055 DC# CV-96-00335-JWS District of Alaska, Anchorage ORDER

Appeal from the United States District Court
for the District of Alaska
John W. Wedwick, District Judge, Presiding

Argued and Submitted September 12, 2002
Seattle, Washington

Gerald Plunk appeals from the district court's grant of summary judgment and order of forfeiture. We affirm in part, reverse in part, and remand. Because the facts are familiar to the parties, we recount them only as necessary to explain our decision.

The only properties at issue in this appeal are a 1975

SuperCub airplane, $5,000 in a vacuum-packed, heat-sealed bag, $50,000 substituted for Plunk's Big Mountain Lodge, and the Hock Lake property. The district court held that all four of these items were subject to civil forfeiture pursuant to 21 U.S.C. § 88 1(a). 21 U.S.C. § 881(a) provides for forfeiture of all property (both real and personal), including money, that was used to facilitate drug trafficking or is traceable to proceeds from drug trafficking. See 21 U.S.C. § 88 1(a). Plunk makes several arguments against the validity of any civil forfeiture order in his circumstances.

First, Plunk argues that because he has already been convicted for drug trafficking, the Double Jeopardy Clause of the Fifth Amendment prevents him from being punished again through a civil forfeiture action. Civil forfeiture actions under 21 U.S.C. § 881, however, are not punitive for Double Jeopardy purposes. United States v. Ursery, 518 U.S. 267, 290-92 (1996).

Second, Plunk maintains that the government has created a Hobson's choice for him by forcing him either to invoke his Fifth Amendment right against self incrimination in the forfeiture proceedings and risk losing his property or to testify in the proceedings and risk providing evidence which could be used against him in future criminal proceedings or his pending habeas petition. We find this argument unconvincing. Plunk was not required to testify during the forfeiture proceedings. Nor was it necessary for Plunk to testify in order to defend his property. He could have presented, through other witnesses, testimonial or documentary evidence demonstrating his ownership of the property in question and the absence of any connection between the property and drug transactions. Therefore, his Fifth Amendment rights are not implicated. See Doe v. United States, 487 U.S. 201, 206 (1988) (stating that the Fifth Amendment privilege against self-incrimination only

applies to the witness testifying and does not "proscribe incriminating statements elicited from another.")

Finally, Plunk argues that the government has not established probable cause sufficient to warrant forfeiture of the properties. With this contention we agree in part.

Under the law applicable at the time the forfeitures in the case occurred, the government had to meet only "the initial burden of establishing probable cause connecting the seized property with illegal drug transactions." United States v. Currency, U.S., $42,500, 283 F.3d 977, 980 (9th Cir. 2002); see also 21 U.S.C. §88 1(d); 19 U.S.C. § 1615. Once the government met this burden, the burden shifted to the claimant to prove by a preponderance of the evidence that the property or money was not connected with drug activity. United States v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984) (citing United States v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1983)); see also Ursery, 518 U.S. at 289; United States v. $80,180.00 in U.S. Currency, 303 F.3d 1182, 1184 (9th Cir. 2002).

Instead of presenting evidence in his favor during the forfeiture proceedings, Plunk remained silent, invoking his Fifth Amendment right against self-incrimination. Assertion of one's Fifth Amendment rights is not a substitute for evidence. See United States v. Rylander, 460 U.S. 752, 761 (1983). Therefore, if the government has established probable cause sufficient to warrant forfeiture as to a particular piece of the property, then forfeiture of that property must be affirmed. See United States v. $129,727 U.S. Currency, 129 F.3d 486, 49 1-94 (9th Cir. 1997) (holding that forfeiture of property solely based on a showing of probable cause by the government is constitutional when the claimant presents no evidence on his behalf); see also $80,180.00, 303 F.3d at 1184-86 (holding

that the heightened burden of proof established by the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000), does not apply retroactively).

Probable cause can only be established with evidence that existed at the time the government filed the forfeiture complaint. United States v. $405,089.23 U.S. Currency, 122 F.3d 1285, 1289 (9th Cir. 1997) (citing United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1071 (9th Cir. 1994)). The government filed its forfeiture complaint for the SuperCub airplane on September 8, 1994. The forfeiture complaint for the other three pieces of property was not filed until September 16, 1996, approximately one month after Plunk's conviction. Therefore, the fact of his conviction and the testimony and evidence presented at trial can be considered in the probable cause inquiry only with regard to the $5,000 cash, the $50,000 (substituted for the Lodge), and the Hock Lake property.

We conclude as follows regarding the various pieces of property:

1. The district court found that probable cause existed for the forfeiture of the $5,000 in a heat-sealed package. We agree. The $5,000 was found in a safe in Plunk's Longbow residence behind a false wall. The cash was inside a vacuum-packed, heat-sealed container. The heat-sealed container indicates that the money is related to drug activities. Such containers are used to disguise the scent of drugs on the currency in order to prevent sniffer dogs from alerting to the money. See, e.g., $42,500, 283 F.3d at 982; $129,727.00, 129 F.3d at 488, 491. Three of Plunk's drug couriers also testified at trial that they received cash from Plunk in such heat-sealed packages. This testimony further supports probable cause to find that the money was the proceeds of or used to facilitate drug transactions.

2. The district court found probable cause for forfeiture of the $50,000 substituted for the Big Mountain Lodge. Again, we agree. Evidence at trial suggested that Plunk used the Lodge in his cocaine trafficking activities. One witness testified that he sent cocaine to Plunk via U.P.S. and Federal Express in packages addressed to the Lodge. Another witness stated that Plunk would make fictitious reservations at the Lodge and then send cash from drug transactions to the Lodge as deposits for these fictitious guests. In addition, the heat-sealing equipment was bought in the name of the Lodge and the equipment was stored there. This evidence establishes probable cause to connect Big Mountain Lodge to Plunk's drug transactions.

3. The district court also found probable cause for the forfeiture of the Hock Lake property. We cannot determine from the current record whether the government has met its initial burden of establishing probable cause linking the Hock Lake property to the drug trade.

The only possibly sufficient evidence is Pierson's 1997 affidavit. This affidavit was given after the filing of the forfeiture complaint. The district court relied upon the Pierson affidavit in its decision as the principal basis for finding that the government had probable cause.

We cannot tell from the record whether the government knew the information contained within the Pierson affidavit at the time the forfeiture complaint was filed, or whether it obtained that information thereafter. Plunk did not object to consideration of the affidavit in the determination of probable cause on grounds that the government did not have the information contained therein when the forfeiture complaint was filed (although he did contest probable cause on other grounds). The fact remains,

however, that on the present record, we cannot affirm the probable cause finding, as we cannot tell whether the requisite legal standard was met. We therefore remand to the district court for a determination of when the government knew the information related to the Hock Lake property contained within Pierson's affidavit. Cf. $405,089.23, 122 F.3d at 1291-92 (allowing remand for government to establish when it knew information because standard requiring sufficient evidence of probable cause at the time of filing of forfeiture complaint was not established until after government filed its summary judgment motion).

4. Finally, the district court found probable cause for the forfeiture of the SuperCub. We disagree. The forfeiture complaint against the SuperCub was filed in 1994. The evidence thereafter obtained at trial, and the conviction itself, are all inadmissible in the probable cause determination.

The government relies on several other bases for connecting the SuperCub to the drug trade. The first is the allegation that Plunk paid for the airplane in cash. Payment in cash on its own is not sufficient to establish a connection to a drug transaction. We have previously held that a large amount of money standing alone cannot establish probable cause. $42,500, 283 F.3d at 98 1-82 (citing $191,910, 16 F.3d at 1072). Similarly, large cash payments absent any other proof of a "connection between that cash and illegal drug transactions" is insufficient to establish probable cause. $405,089.23, 122 F.3d at 1289. Such payments may indicate some illegal transaction, but not necessarily one related to narcotics. See id. ("[A] mere suspicion that the money is connected to some illegal activity is not enough to establish probable cause that the money was connected to drugs.") (quoting United States v. U.S. Currency $30,060.00, 39 F.3d 1039, 1044 (9th Cir. 1996).

The government also asks us to consider allegations that Plunk used airplanes to smuggle drugs. In particular, the Zeznock affidavit mentions Plunk's use of a Piper Navajo aircraft to transport cocaine. The fact that someone is a drug smuggler and uses certain airplanes in the operation does not mean that a different airplane owned by the smuggler is used to transport drugs. Especially in Alaska, there are legitimate reasons for Plunk to use and own planes. The government therefore must establish a connection between the particular property at issue, the SuperCub, and drug trafficking. Zeznock's affidavit does not provide any evidence specifically linking the SuperCub to narcotics. Thus, even if the information in the 1996 Zeznock affidavit was known at the time of the filing of the 1994 forfeiture complaint, it is insufficient to establish probable cause for the forfeiture of the SuperCub.

Finally, the government points to Pierson's statement in his affidavit that "I *think* Plunk obtained this plane.., in exchange for 1 or 2 kilos of cocaine." (Emphasis added). Even if the government had this information from Pierson in 1994, it is insufficient to establish probable cause. Elsewhere in his affidavit Pierson makes numerous definitive statements such as "I know" and "Plunk obtained property. . . in exchange for cocaine" without any qualification. In this context, the less certain "I think" is not enough to establish probable cause. Each side shall bear its own cost.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FILED
JUL 15 1998
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By /s/ Deputy

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. TWELVE PIECES OF PROPERTY, et al.

THE HONORABLE JOHN W. SEDWICK

Case No. A96-0335 CV (JWS)

Deputy Clerk	Official Recorder
Pam Richter	

APPEARANCES: for PLAINTIFF: ----
for DEFENDANT: ----

PROCEEDINGS: ORDER FROM CHAMBERS

At docket 72 claimant Plunk and the in rem defendants have filed a renewed motion to stay proceedings in this forfeiture action. The motion is opposed. No party has requested oral argument and it would not be of material aid to the court. The court has previously denied a motion to stay by Plunk, and the court finds the arguments presented by the government in its opposition at docket 77 to be persuasive. Based upon these facts and the authorities cited by the government, the motion at docket 72 is DENIED.

At docket 73, the government moves for summary judgment.

The motion is opposed. No party has requested oral argument and it would not be of material aid to the court. Plaintiff has supported its motion with undisputed facts showing that it has met its burden of proof. The authorities cited by plaintiff show that Plunk may not use his Fifth Amendment privilege against self-incrimination to avoid the force of the government's proof in this civil action. Based upon the undisputed facts, plaintiff is entitled to judgment as a matter of law. The motion at docket 73 is GRANTED.

DATE: July 15, 1998

ENTERED AT JUDGE'S DIRECTION

INITIALS: prr
Deputy Clerk

A96-0335—CV (JWS)

P. WEIDNER (WEIDNER)
E. O'LEARY (US – ATTNY)
G. MILLER (BIRCH)

FILED
MAY 19 1997
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	) **Case No. A96**
	) **–335 CV**
TWELVE PIECES OF REAL	) **(JWS)**
PROPERTY with all Appurtenances and	)
Improvements thereon, located in Alaska	) **ORDER**
and known as: TIMBERLUX	) **FROM**
SUBDIVISION, Addition #3, Block F,	) **CHAMBERS**
Lot 3, also known as 14940 Longbow	)
Drive; T17NR5W, Section 33, SEWARD	) **(Motion to**
PRIME MERIDIAN, ALASKA, Tract A,	) **Dismiss -**
Plat 77-49, Alaska State Land Survey	) **Docket 40)**
No. 76-182 with Cabin; 12.32 Acres of	)
Unimproved Real Property, more fully	)
described as INLET VIEW	)
SUBDIVISION, MATSU BOROUGH,	)
ALASKA: Lot 2, Block 1; Lot 10,	)
Block 1; Lot 11, Block 1; Lot 7, Bock 5;	)
Lot 8, Block 5; Lot 5, Block 6; Lot 6,	)
Block 6; Lot 7, Block 6; .60 Acres of	)
Unimproved Real Property Located	)
at RABBIT CREEK HEIGHTS, Lot 6,	)
Block 4; Anchorage, Alaska; ANY AND	)

ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 in U.S. Currency; and ONE HEAT-SEALED BAG OF APPROXIMATELY $5,000 in U.S. Currency, *in rem*,

Defendants.

MOTIONS PRESENTED

The text of this order has been drafted so that, with the addition of the appropriate case heading, it is suitable for filing in two civil forfeiture actions which present essentially the same issues and in which the plaintiff and the principal claimant are identical. At docket 44 in Case No. A94-401 CV (hereinafter the "Aircraft Case" because the *in rem* defendants are four aircraft), claimant and reputed owner Gerald Frank Plunk ("Plunk") has filed a motion for dismissal on the grounds that the civil forfeiture action against the defendant properties is barred by principles of res judicata, double jeopardy, estoppel, and other somewhat more amorphous grounds. At docket 40 in Case No. A96-335 CV (hereinafter the "Real Property Case," because most of the *in rem* defendants are parcels of real property), claimant Plunk has filed an identical motion. The motions have been opposed by plaintiff United States ("the government"). A joint oral argument was heard on May 16, 1997.

DISCUSSION

The principal basis for Plunk's motion is this: First, in his criminal prosecution, United States v. Plunk, Case No. A94-036 CR ("Criminal Case"), Plunk was awarded a judgment of acquittal on the forfeiture count as it applied to certain of the properties which are the subject of the foreclosure actions, because the government failed to present evidence with respect to them sufficient to warrant forfeiture; and second, that principles of *res judicata* therefore bar the government from pursuing a claim against those properties in the instant civil forfeiture action. A brief comment on the precise nature of the judgment of acquittal is in order. In the Criminal Case, forfeiture was sought pursuant to 21 U.S.C. § 853 on the theory that Plunk had participated in a continuing criminal enterprise ("CCE"). The CCE count was one of many serious charges against Plunk, who was convicted on several counts and eventually sentenced to life in prison. However, the jury was unable to reach a verdict on the CCE count. Plunk moved for a judgment of acquittal as to the forfeitures on the grounds that the government had failed to present enough evidence to obtain a forfeiture even if he were guilty of participating in the CCE. This court held that, with respect to the four aircraft and several of the *in rem* defendants in the Real Property Case, the government had failed to present enough evidence to obtain a forfeiture, granted Plunk's motion, and

entered a judgment of acquittal as to the forfeiture of certain properties.[1]

The motions addressed here apply only to those of the properties as to which a judgment of acquittal was entered in the Criminal Case. These properties are all of the *in rem* defendants in the Aircraft Case and the following *in rem* defendants in the Real Property Case: (1) the cabin and acreage in Section 33 of T17N, R5W, S.M.; (2) the eight lots in the Inlet View Subdivision; and (3) Lot 6, Block 4, Rabbit Creek Heights Subdivision. The motion in the Real Property Case does not involve the residence at 14940 Longbow Drive, Anchorage Alaska, or the heat-sealed bag of currency found at the Longbow Drive residence, or the $50,000 proceeds of the sale of the Big Mountain Lodge, as to which the court found there was ample evidence to support a forfeiture. See Appendix 2.

The government opposes the motions on both procedural grounds and on the merits. The procedural problem, as the government sees it, is that the motions are really untimely motions for reconsideration of earlier orders. The rather snarled procedural history of the Aircraft Case and the Real Property Case deserves some comment. Prior

---

[1]Plunk's motion for judgment of acquittal was granted in an order at docket 424 in the Criminal Case and the judgment of acquittal as to the forfeitures was entered at docket 428 in the Criminal Case. Copies of these documents are attached as Appendices 1 and 2 to this order.

proceedings are nearly identical in the two cases; for brevity, the discussion in the next paragraph will recount the proceedings in the Real Property Case.

To begin with, Plunk initially failed to file a verified claim as he should have.[2] Instead, at docket 14, Plunk filed a motion entitled "Notice Of Challenge To Jurisdiction Of The Court And Motion To Dismisses For Lack Of Jurisdiction And Stay Of Proceedings." That motion was denied in part and granted in part, the upshot being that Plunk was given 30 days to file a verified claim. In the interim, at docket 30, Plunk and the *in rem* defendants had filed a "Notice of Judgment of Acquittal..." which the government opposed at docket 32, arguing as to Plunk that its earlier briefing was persuasive and as to the *in rem* defendants that the judgment in the Criminal Case had no bearing on the *in rem* defendants. Plunk sought additional time both to file a verified claim and to file additional briefing as to the motion at docket 30. The court allowed him additional time to file a verified claim, but denied additional time to file briefing in an order at docket 35. The order was premised on the proposition that Plunk had yet to file the verified claim necessary to allow him to engage in motion practice. Despite the language of the order which the government has reasonably interpreted to support its position, the order at docket 35 was not intended to foreclose subsequent motion practice by Plunk if he timely filed a verified claim. Accordingly, the court will consider the present motions on their merits.

---

[2]Plunk's failure to proceed with dispatch occurred in circumstances which doubtless made it difficult for him and his counsel to proceed more expeditiously. In August of 1996, Plunk was convicted in the Criminal Case. His sentencing was set for November 18, 1996. It was evident

that he faced the possibility of a life sentence. He was incarcerated pending sentencing. The Real Property Case was filed on September 16, 1996, and the Aircraft Case had been stayed during the pendency of the of the Criminal Case at the government's request..

In lay terms, Plunk asks the court to disallow the government a second bite at the forfeiture apple. He correctly argues that the government had a chance in the Criminal Case to seek forfeiture of the properties to which his motion applies and failed to prove they were subject to forfeiture. In its original order granting the motion for judgment of acquittal in the Criminal Case (Appendix 1), the court erroneously assumed that the order and subsequent judgment (Appendix 2) would bar prosecution of the Aircraft Case and bar prosecution of the Real Property Case as to certain properties on an issue preclusion theory, because the court failed to take into account the fact that the burden of proof under 21 U.S.C. § 853 -- proof by a preponderance of the evidence -- was higher than the probable cause showing required in the civil forfeiture proceedings presently pending. If the government makes a showing of probable cause, then unless Plunk rebuts it, the showing of probable cause is adequate to support the forfeiture. United States v. $5,644,540 in U.S. Currency, 799 F.2d 1357 (9th Cir. 1986). The fact that the burden of proof is lower in the pending case means that the judgment of acquittal in the Criminal Case cannot be employed here in the manner in which Plunk would have it employed, because the judgment held no more than that the government had failed to establish forfeitability by a preponderance of the evidence. Thus, the lower burden of proof in the instant proceeding forecloses what would otherwise be an appropriate situation for application of the issue preclusion principles of res judicata.

There is an additional complication introduced here

which arises from the fact that the same judge who granted the judgment of acquittal in the Criminal Case is presiding in the Aircraft Case and the Real Property Case. As a result, the court knows that the government in fact did not present evidence at trial sufficient to show probable cause to forfeit that property embraced by the pending motions, although there is no finding to that effect in the Criminal Case and the judgment of acquittal does not, of course, depend upon such a finding. One further factor to be considered in the Aircraft Case is that there was a finding of probable cause to arrest the *in rem* defendants made by the magistrate judge prior to the trial in the Criminal Case (based on evidence not presented again at the trial in the Criminal Case). This additional factor cannot be considered in the Real Property Case which was not initiated until after the trial in the Criminal Case.

Assuming that all of the other factors necessary for the application of issue preclusion are present here, and this court finds that they are, Plunk's *res judicata* argument turns on a choice between this court's turning a blind eye on the failure of proof of forfeitability in the Criminal Case and adhering to the principle that a judge cannot apply extra record knowledge to the resolution of a dispute. This court concludes that it is more important to adhere to the principle that extra-record knowledge cannot be used to decide a case. That being so, the judgment of acquittal in the Criminal Case is not a bar to the prosecution of the Aircraft Case or the Real Property Case.

Plunk's argument that double jeopardy forecloses a civil forfeiture action is without merit, because civil forfeiture is not punishment. United States v. Ursery _ U S _, 116 S. Ct. 2135, 2148-49 (1996). Plunk's collateral estoppel argument is really a species of *res judicata* and fails for the reason set out above. The court has considered the other

arguments which Plunk makes and finds them to be without merit.

CONCLUSION

For the reasons given above, the motion at docket 44 in the Aircraft Case is **DENIED,** and the motion at docket 40 in the Real Property Case is **DENIED.** This order is not subject to reconsideration or other collateral attack in this court.

DATED this 19 day of May 1997 at Anchorage, Alaska.

/S/
JOHN W. SEDWICK
UNITED STATES DISTRICT COURT

FILED
JAN 17 1997
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By /s/ Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	) **Case No. A96**
	) **–335 CV**
TWELVE PIECES OF REAL PROPERTY with all Appurtenances and Improvements thereon, located in Alaska and known as: TIMBERLUX SUBDIVISION, Addition #3, Block F, Lot 3, also known as 14940 Longbow Drive; T17NR5W, Section 33, SEWARD PRIME MERIDIAN, ALASKA, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182 with Cabin; 12.32 Acres of Unimproved Real Property, more fully described as INLET VIEW SUBDIVISION, MATSU BOROUGH, ALASKA: Lot 2, Block 1; Lot 10, Block 1; Lot 11, Block 1; Lot 7, Bock 5; Lot 8, Block 5; Lot 5, Block 6; Lot 6, Block 6; Lot 7, Block 6; .60 Acres of Unimproved Real Property Located at RABBIT CREEK HEIGHTS, Lot 6, Block 4; Anchorage, Alaska; ANY AND ALL PROCEEDS FROM THE SALE	) (JWS))) **ORDER**) **FROM**) **CHAMBERS**)) **(Re: Motion**) **to Dismiss**) **Due to**) **Double**) **Jeopardy and**) **Issue Preclu-**) **sion and res**) **judicata or**) **Collateral**) **Estoppel -**) **Docket 30)**

OF SAID PROPERTY; $50,000 in U.S. Currency; and ONE HEAT-SEALED BAG OF APPROXIMATELY $5,000 in U.S. Currency, *in rem*,

Defendants.

MOTIONS PRESENTED

At docket 30, claimant Gerald Frank Plunk ("Plunk") has moved for dismissal of this action on double jeopardy and issue preclusion/res judicata/collateral estoppel grounds. The motion is opposed. No party has requested oral argument and it would not be of material aid to the court.

BACKGROUND

Plaintiff commenced this action seeking the civil forfeiture of the in rem defendant pieces of property[1] ("Subject Property") pursuant to 21 USC. § 881(a)(6) as proceeds from violations of 21 U.S.C. § 801 et seq. Plunk was a defendant in United States v. Plunk, Case No. A94-036 CR ("Criminal Case"). The indictment in the Criminal Case charged Plunk with several violations of 21 U.S.C. § 801 et seq. including participation in a continuing criminal

[1]The property which the Government sought to have forfeited may be briefly described as follows:

a. Heat sealed bag of currency in the amount of $5,000.00. ("the Currency").

b. Residence located at 14940 Longbow Drive in Anchorage, Alaska ("Plunk's Residence").

c. Cabin and acreage in Section 33, T 17N R SW, Seward Meridian ("Cabin"). d. 4.99 acres in Section

22, T 27N R 4W, Seward Meridian ("Tract A").
e. Eight lots situated in the Inlet View Subdivision in the Matanuska-Susitna Borough ("Inlet View Lots")
f. Lot 6, Block 4 of the Rabbit Creek Heights Subdivision in Anchorage ("Rabbit Creek Lot").
g. $50,000.00 in United States currency which represents the sale proceeds of all right, title or interest of Gerald Frank Plunk in Big Mountain Lodge, Inc. to Phillip Paul Weidner (the "Lodge").

enterprise ("CCE") in violation of 21 U.S.C. § 848. In the Criminal Case, the government sought to have the Subject Property and other properties forfeited pursuant to 21 U.S.C. § 853 which required a conviction on the CCE charge. The jury was unable to reach a verdict on the CCE count, and so never decided whether the Subject Property was or was not forfeitable. However, the court upon motion by Plunk held that the government failed to present proof that the Subject Property was forfeitable, with the exception of the Currency, the Lodge, and Plunk's Residence.

The unusual outcome on the forfeiture count in the Criminal Case was the result of Plunk's insistence on his right to have all of the evidence presented in the government's case in chief. Thus, during the course of the Criminal Case, this court ruled that the government would be required to present its proof of the forfeitability of Plunk's property (which included the Subject Property) during its case in chief. As explained in a post trial order dated November 18, 1996 at docket 424 in the Criminal Case ("Order"):

> In United States v. Feldman, 853 F.2d 648 (9th Cir. 1988), cert. denied, 89 U.S. 1030, 109 S.Ct. 1164, 103 L.Ed.2d 222 (1989), the Ninth Circuit exercised

> its supervisory powers to create a presumption in favor of bifurcation of guilt and forfeiture determinations. The Feldman presumption is clearly rooted in a concern to preserve a criminal defendant's Fifth Amendment right to avoid self-incriminating testimony, while at the same time affording the defendant an opportunity to testify in opposition to a forfeiture demand. Confronted with a defendant insistent upon the presentation of all evidence regarding the forfeiture in the guilt phase, but cognizant of the concerns raised..., in Feldman, this court [required the government] to present all of its forfeiture evidence in the guilt phase of the trial, [while providing] defendant would be allowed to testify in a subsequent phase of the trial, if he wished to do so, on the forfeiture issues.

Order at p. 3 (footnote omitted).

In post verdict proceedings, this court held that at trial there was ample evidence to support forfeiture of the Currency, Plunk's Residence and the Lodge. Regarding the remainder of the Subject Property, this court held that the United States had failed to present evidence sufficient to raise the rebuttable presumption of 21 U.S.C. §.853(d). Order at p. 6. That statute provides a rebuttable presumption that property of a person convicted of a felony is forfeitable if the United States establishes that the property was acquired during the period of the violation and the absence of any other likely source for the property "by a preponderance of the evidence." Thus, this court held in the Criminal Case that the government did not show by a preponderance of the evidence that the Cabin, Tract A, the Inlet View Lots and the Rabbit Creek Lot were acquired during the period of the violation in circumstances where there was no likely other source for the property.

DISCUSSION

Plunk's argument that double jeopardy forecloses this civil forfeiture action is without merit, because the civil forfeiture is not a punishment. United States v. Ursery __U.S. __, 116 S.Ct. 2135, 2148-49 (1996). Plunk's argument that collateral estoppel principles do foreclose the present action may appear to have merit with respect to all of the Subject Property, other than the Currency, the Lodge, and Plunk's Residence as to which three items there is no earlier judgment to support application of res judicata principles.

The concept of res judicata (something has already been litigated) embraces the notion of collateral estoppel (use of the original judgment to foreclose other litigation) which in turn embraces two related concepts, issue preclusion and claim preclusion. It is issue preclusion that is relevant here. In essence the concept of issue preclusion holds that when a party has had an opportunity to litigate an issue, he is bound by the outcome of the litigation. Here, the government had an opportunity in the Criminal Case to litigate whether or not the Subject Property was the proceeds of Plunk's violations of 21 U.S.C. § 801 et seq. The government lost on that issue. Plunk argues that issue preclusion means that the government's failure to prove the forfeitability of most of the Subject Property in the Criminal Case forecloses prosecution of the instant civil forfeiture proceeding, because it depends in part upon resolution of the same issue --was the property proceeds of Plunk's drug trafficking.

The argument is sufficiently evident that when this court issued the Order, it assumed that Plunk would make a motion in this action based upon issue preclusion and that

the motion would be granted. However, this court labored under the reasonable but mistaken assumption that the government must shoulder an identical "preponderance of the evidence" burden of proof in this civil forfeiture proceeding. Plunk's motion is premised upon the same error. Remarkably, the burden of proof upon the government in the instant action is actually lower than the preponderance of the evidence standard. The burden the government must meet is only to show "probable cause" that the Subject Property is forfeitable. If it can do so, the burden then shifts to the claimant to present proof by a preponderance of the evidence that the property is not forfeitable. An unrebutted showing of probable cause is an adequate basis for forfeiture. United States v. $5,644,540 in U.S. Currency, 799 F.2d 1357 (9th Cir. 1986).

The judgment in the Criminal Case therefore does not foreclose prosecution of the civil forfeiture claim at bar, because the burden of proof on the common issue in the instant action is lower than that applicable to the forfeitability issue in the Criminal Case. Here, the government could succeed merely by showing probable cause; there the government had to prove forfeitability by a preponderance of the evidence.

CONCLUSION

For the reasons set out above, the motion at docket 30 is **DENIED**

DATED at Anchorage, Alaska, this 15 day of January 1997.

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
DEC 2 1996
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By /s/

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. A96-0335 CV (JWS)**
vs.	)	
TWELVE PIECES OF REAL PROPERTY, et al.,	)	**ORDER FROM CHAMBERS**

I. INTRODUCTION / MOTIONS PENDING

This action concerns the civil forfeiture of real and personal property pursuant to 21 U.S.C. § 881(a)(6) and/or (7) and 18 U.S.C. § 981(a)(1)(A) for violations of 21 U.S.C. § 801 et seq., and 18 U.S.C. §1956(a)(1)(B)(i). The defendant real properties were arrested pursuant to judicially issued in rem warrants. Plaintiff filed its verified civil forfeiture complaint on September 16, 1996. Gerald Frank Plunk ("Plunk"), the alleged owner of the in rem property, and his attorney were served with notice of this action on October 8, 1996. Notice of this action was published per the Supplemental Rules for Admiralty and Maritime Claims on October 13, 20, and 27, 1996.

Instead of filing a verified claim pursuant to

Supplemental Rule C(6)[1] the in rem defendants ("Twelve Pieces of Property") and Plunk jointly filed a motion at Docket 14 asking the Court to (1) dismiss the pending civil forfeiture proceeding for lack of jurisdiction; (2) stay the civil forfeiture action pending a final resolution in the criminal proceedings in United States v. Plunk, Case No. A94-0036 CR (JWS), including any appellate proceedings resulting from the same, and/or any retrial; and (3) issue an order directing that no sworn claim under Rule C(6) of the Supplemental Rules or answer need be filed until after the completion of the aforementioned criminal matters and appeals. The defendants filed their motion on October 16, 1996, within ten days after process was served.

On October 29, 1996, plaintiff United States of America ("Government") requested the Clerk of Court to enter a default judgment against the defendant real and personal property and all persons and entities having an interest in the defendant property who have failed to file a verified claim pursuant to Rule C(6) of the Supplemental Rules. The Clerk of Court refused to enter default due to the defendants' pending motion. At Docket 21, pursuant to Fed. R. Civ. P. 60(a), the Government requests the Court correct the clerical mistake of the Clerk of Court and issue a default judgment.

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[1]Rule C(6) of the Supplemental Rules provides: The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action.

II. DISCUSSION

In forfeiture proceedings brought under 21 U.S.C. § 881, the Supplemental Rules for Certain Admiralty and Maritime Claims must be followed. 21 U.S.C. § 881(b). In the present case, instead of filing a verified claim or answer the defendants filed a motion within the ten days after process which, among other things, asked the Court for an extension of time to file a verified claim and answer. The Government contends that by failing to file a verified claim pursuant to Rule C(6), the defendants do not have standing to file a motion before the Court. Therefore, the Government asserts that it is entitled to a default judgment. Supplemental Rule C(6) requires a claimant to "file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court" (emphasis added). Thus, it is within the district court's discretion to permit an extension of time to file a claim. United States v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1435 (9th Cir. 1985).

In Yukon the government sought forfeiture of a condominium, as well as other properties, pursuant to 21 U.S.C. § 881(a)(6). An arrest warrant against the condominium was issued, and the defendants were served with a complaint directing interested persons to file a verified claim. The defendants failed to file a verified claim within the specified time. However, the defendants did file an answer to the complaint within the requisite time that identified themselves as owners of the condominium. After discovery had been completed and the case had been set for trial, the government realized that a verified claim had not been filed. The district court denied the defendants' nonopposed application for permission to file a verified claim, finding that it had no discretion to extend the time for the filing of a verified claim and, further, that the defendants

had not shown excusable cause for leave to file their claims late because they had received adequate notice of the need to file a timely verified claim.

Upon review, the Ninth Circuit held, based on the language of Rule C(6), that the district court does have discretion to extend the time for filing a verified claim and that nothing in the rule imposes a time limit on the exercise of that discretion. Id. at 1435. However, the appellate court noted that the trial court should only exercise its discretion to grant additional time where the goals underlying the time restriction and the verification requirement are not thwarted. Id. at 1436. Additionally, the court should consider whether the government would be prejudiced by allowing the late filing. Id.

Time Restriction

The purpose of the time limit is to force claimants to come forward as soon as possible after forfeiture proceedings have been initiated so that all interested parties can be heard and the dispute resolved without delay. Id. The defendants came forward within the time prescribed by Rule C(6) for filing a verified claim and announced Mr. Plunk's interest in the properties by filing a motion that identified him as the owner of the subject properties. Thus, the goals behind the time restriction would not be defeated by allowing an extension of time to permit the late filing.

Verification Requirement

The significance of the requirement that a claim be verified on oath or solemn affirmation is to minimize the danger of false claims. Id. The Ninth Circuit explained that where a claimant has made known to the court and the government his interest in the subject property before the

deadline set for the filing of a proper claim has passed, the policy interest underlying the requirement of a timely verified claim would not be injured by allowing the claimant to perfect his claim by subsequent verification. Id. Although the defendants in the instant case filed a motion and not a verified answer, the court and the government were well aware of the defendants' interests in the subject properties. There is no policy reason to prevent the case from further proceeding provided the defendants do file a verified claim.

Prejudice

Despite the discovery that the Yukon claimants had failed to file a verified claim, the government did not move the court to have the property forfeited for lack of a verified claim. The Ninth Circuit found significant that the government had treated the claimants as owners and proceeded with the case in preparation for trial for over a year. Id. That is not the situation here. From the outset, the Government has asserted that it is entitled to a default judgment and that it should not be required to proceed to trial with a case where no claimant has filed a timely verified claim. However, under the present circumstances, the Government would certainly not be prejudiced by a court order allowing the defendants an extension of time to file a verified claim, because at no time during the civil forfeiture action has there been any doubt that Plunk is at least one of the owners of the subject properties.

IV. CONCLUSION

For the foregoing reasons, the defendants are granted a 30-day extension of time to file a verified claim. However, unless and until the defendants file a verified claim they do not have standing to challenge jurisdiction or request a stay. Therefore, the motion at Docket 14 is **GRANTED IN**

PART AND DENIED IN PART without prejudice. The motion at Docket 21 is **DENIED.** Plunk shall file his verified claim within 30 days of the date of this order.

DATED this 2nd day of December 1996 at Anchorage, Alaska.

/s/
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
NOV 18 1996
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By /s/

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. A94-36 CR (JWS)**
vs.	)	
GERALD FRANK PLUNK,	)	**ORDER FROM CHAMBERS**
Defendant.	)	

MOTIONS PRESENTED

On August 16, 1996, counsel for defendant Gerald Frank Plunk ("Plunk") moved orally a judgment of acquittal on the forfeiture sought in Count 2 of the superseding indictment. The oral motion was noted at page 3 of the court minutes filed at docket 382. Pursuant to the court's order at docket 400, the oral motion has been supported by written argument set out in Plunk's pleading at docket 403, which also serves as his opposition to the motion at docket 394 by plaintiff United States of America ("Government") which seeks dismissal of Counts 2, 10, and 12 of the superseding indictment, pursuant to Fed. R. Cr. P. 48(a). Both motions have been fully briefed. Oral argument was heard on November 15, 1996. This order sets out the court's

disposition of Plunk's motion at dockets 382/403 and the government's motion at docket 394.

BACKGROUND

Plunk was prosecuted pursuant to a twelve-count superseding indictment which charged him in ten counts (two of the twelve counts charged only John Timothy Pierson who was tried separately) with four different types of criminal violations all related to the distribution of cocaine. Following a lengthy trial, the jury returned verdicts on seven of the counts against Plunk with the following results:

1. Guilty on Count I: Conspiracy to Distribute Cocaine from on or about April 1, 1993, through on or about December 31, 1993, in violation of 21 U.S.C. §§ 841 (a)(1) and 846. As charged, this conspiracy involved the transportation of cocaine from locations in the western United States to the eastern United States ("Outside conspiracy").

2. No verdict on Count 2, Conduct of a Continuing Criminal Enterprise ("CCE") from on or about April 1 1993, through and including December 1993, in violation of 21 U.S.C. § 848. Count 2 also sought forfeiture of specified property pursuant to 21 U.S.C. § 853.

3. Guilty on Count 3, Use of a Communication Facility on or about December 7, 1993, in violation of 21 U.S.C. § 843(b).

4. Guilty on Count 4, Use of a Communication Facility on or about December 5, 1993, in violation of 21 U.S.C. § 843(b).

5. Guilty on Count 5, Use of a Communication Facility on or about December 8, 1993, in violation of 21 U.S.C. § 843(b).

6. Guilty on Count 6, Use of Communication Facility on or about December 11, 1993, in violation of 21 U.S.C. § 843(b)

7. Count 7 included no charge against Plunk.

8. Count 8 included no charge against Plunk.

9. Not Guilty on Count 9, Distribution of Cocaine on or about June 4, 1993 in violation of 21 U.S.C. § 841(a)(1).

10. No Verdict on Count 10, Distribution of Cocaine on or about August 21, 1993, in violation of 21 U.S.C. § 841(a)(l).

11. Guilty on Count 11, Distribution of Cocaine on December 12, 1993, in violation of 21 U.S.C. § 841(a)(1).

12. No verdict on Count 12, Conspiracy to Distribute Cocaine from on or about the Fall of 1980 until on or about December 31, 1993. As charged, this conspiracy alleged the distribution of cocaine in Alaska ("Alaska conspiracy").

In Count 2 of the superseding indictment, the Government set out a demand for the forfeiture of certain assets pursuant to 21 U.S.C. § 853(a). The Government asked for a bifurcated trial such that evidence regarding the forfeiture would be presented to the jury after the guilt phase was decided. Plunk's counsel doggedly resisted this request

insisting that Plunk had an absolute right to demand that the government present all of its evidence at one time. In United States v. Feldman, 853 F.2d 648 (9th Cir. 1988), cert. denied, 489 U.S. 1030, 109 S. Ct. 1164, 103 L.Ed.2d 222 (1989), the Ninth Circuit exercised its supervisory powers to create a presumption[1] in favor of bifurcation of guilt and forfeiture determinations. The Feldman presumption is clearly rooted in a concern to preserve a criminal defendant's Fifth Amendment right to avoid self-incriminating testimony, while at the same time affording the defendant an opportunity to testify in opposition to a forfeiture demand. Confronted with a defendant insistent upon the presentation of all evidence regarding the forfeiture in the guilt phase, but cognizant of the concerns raised and the supervisory direction given in Feldman, this court ruled that the Government would be required to present all of its forfeiture evidence in the guilt phase of the trial, but that, in the event of a conviction on Count 2, defendant would be allowed to testify in a subsequent phase of the trial, if he wished to do so, on the forfeiture issues.

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[1]The Feldman court did not describe its supervisory rule as a presumption in favor of bifurcation, but that term seems to describe the rule because the appellate court stated: "[W]e do not adopt a blanket requirement that guilt and forfeiture proceedings be bifurcated completely. Under some circumstances a single procedure may be unfair.... There may be other situations, however, in which the evidence the defendant might present after trial will not affect the jury's decision on forfeiture. Feldman 853 F.2d at 662.

The property which the Government sought to have forfeited may be briefly described as follows:

a. Heat sealed bag of currency seized at 14940 Longbow Drive in Anchorage, Alaska ("the Currency").

b. Residence located at 14940 Longbow Drive in Anchorage, Alaska ("Plunk's Residence").

c. Cabin and acreage in Section 33, T 17N R 5W, Seward Meridian ("Cabin").

d. 499 acres in Section 22, T 27 N R 4W, Seward Meridian ("Tract A")

e. Eight lots situated in the Inlet View Subdivision in the Matanuska-Susitna Borough ("Inlet View Lots).

f. Lot 6, Block 4 of the Rabbit Creek Heights Subdivision in Anchorage ("Rabbit Creek Lot").

g. Lot 66, Tract B, Sky Harbor Estates Subdivision in Anchorage ("Sky Harbor Lot").

h. Big Mountain Lodge at Igiugig, Alaska ("the Lodge").

i. One 1975 Supercub PA-I8, N4545B.

j. One 1967 Cessna 206B, N4994F.

k. One 1968 Arrow Care Seahawk, N76KD.

l. One 1964 Cessna 206, N 5217U with floats, etc.

Items i. through l. were added to those specifically identified in the superseding indictment by a bill of particulars filed at docket 215 (and are hereafter collectively "the Aircraft").

Numerous motions for judgment of acquittal and a motion for a new trial were made by Plunk and denied by the court. The court asked the government whether it would seek a re-trial on Counts 2, 10, and 12 and suggested that a retrial on Count 2 might present double jeopardy problems given the conviction on Count 1. The Government's response advised that it would file a motion to dismiss Counts 2, 10, and 12 (as it has at docket 394) explaining, "By so moving the United States will reserve the right to retry at one proceeding all counts, including the CCE in the event the convictions on Counts 1, 3, 4, 5, 6, and ll are overturned on appeal. In the event the convictions are upheld on appeal, the United States will, of course, dismiss the remaining counts of the indictment including the CCE count." (Docket 393 at p. 2)

DISCUSSION

A. Continuing Criminal Enterprise and Conspiracy

To engage in a CCE, a person must violate one of certain provisions of Title 21 and the violation must be "part of a continuing series of [such violations] which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources." 21 U.S.C. § 848(c). Of course, taking action in concert with others to violate a provision of Title 21 constitutes participation in a conspiracy to violate the same provision. Thus, a CCE charge necessarily includes the elements of a conspiracy offense,

together with the additional elements of supervision and income. The case law suggests that prosecutions for CCE typically include a conspiracy charge. E.g., U S. v. Garcia, 988 F.2d 965, 966-7 (9th Cir. 1993); U.S. v. Davis, 809 F.2d 1194, 1199 n. 1 (6th Cir. 1987); U.S. v. Rhodes, 779 F.2d 1019, 1020 (4th Cir. 1985); U.S. v. Garrett, 727 F.2d 1003, 1006 (11th Cir. 1984). If there are CCE prosecutions in which a conspiracy is not charged, a defendant would have a right to insist on a lesser included offense instruction covering the conspiracy in any event. Keeble v. U.S., 412 U.S. 205, 208, 93 S. Ct 1993, 1995 (1973) (citations omitted.). Thus, double jeopardy concerns preclude a re-trial on the CCE count so long as the conviction for the Outside conspiracy stands.

B. Plunk's Motion:

The statute provides for the forfeiture of the property of a person convicted of violating any of certain provisions of Title 21, if the property constitutes or is derived from proceeds obtained from the violation; was used or intended to be used to commit or facilitate the commission of such a violation; or where the violation was engaging in a CCE, property affording a "source of control" over the CCE. 21 U.S.C. § 853(a). Reduced to essentials, Plunk's argument is that the Government failed to present proof adequate to support forfeiture of the assets at the trial and, therefore, double jeopardy precludes any future attempt by the Government to seek forfeiture of the property in any criminal proceeding, and principles of collateral estoppel (issue preclusion is a better term) preclude the use of any civil forfeiture mechanism to obtain forfeiture of any of the property. The Government opposes by arguing that it did present enough evidence as to many items and that if it did not present sufficient evidence as to any item it was precluded from doing so by Feldman. The argument

premised on Feldman is without merit. This court's rulings during trial made clear that the Government would be required to put on all of its forfeiture evidence (with the exception of rebuttal to Plunk's forfeiture phase testimony, if he did testify) in the guilt phase of the trial.

At trial there was ample evidence to support a forfeiture of the Currency (as proceeds), and Plunk's Residence and the Lodge (as things used to facilitate the violations). There was inadequate evidence to support a determination that the Cabin, Tract A, the Inlet View Lots, the Rabbit Creek Lot, the Sky Harbor Lot or the Aircraft were subject to forfeiture even given the rebuttable presumption set out at 21 U.S.C. § 853(d).[2] Accordingly, had the jury returned a verdict of conviction on Count 2 and then returned a verdict of forfeiture as to all the property, this court would have ordered forfeiture only as to the Currency, Plunk's Residence, and the Lodge.

Of course, there was no verdict on Count 2 and, consequently, neither a jury decision respecting forfeiture, nor as yet any judgment. Plunk's argument that the Government is foreclosed by issue preclusion from pursuing a civil forfeiture of the Aircraft is ripe (in Case No. A94-401,

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[2]The rebuttable presumption requires evidence that the property was acquired during the period of the violation and that there was no likely source for such property other than the violation. 21 U.S.C. 853(d)(1) and (2). In this court's opinion, these requirements were not supported by a preponderance of the evidence -- the relevant standard of proof for criminal forfeitures under this statute, United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989) -- received at trial.

the Government instituted a civil forfeiture action against the Aircraft, Plunk filed a claim to the Aircraft, and the Government recently asked to reopen the civil case, which has been stayed during the pendency of the instant criminal proceeding) but will fail unless this court enters a judgment of acquittal as to the forfeiture of the Aircraft, because issue preclusion requires a judgment in th[illegible]lier action. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194 (1970).

Prior to oral argument, the court was struggling to square the notion that the forfeiture sought is a punishment, and not an element of the crime, Hernandez-Escarsega, 886 F.2d at 1577, with the fact that appropriate punishment is ordinarily not something which is foreclosed by the proof offered at trial. For example, if a defendant were convicted of conspiracy to distribute methamphetamine and the proof at trial did not show the conduct necessary for an upward adjustment of the sort contemplated by U.S.S.G. § 3B 1.1 for having played an aggravating role in the offense, the court would nevertheless not be precluded from considering other evidence at a sentencing for purposes of determining whether to apply the upward adjustment. See United States v. Burnes, 894 F.2d 334, 337 (9th Cir. 1990); United States v. Columbus, 881 F.2d 785, 787 (9th Cir. 1989); U.S.S.C. § 6A1.3. At oral argument, Mr. Weidner responded to the court's questions about this seeming dilemma by emphasizing that in the criminal forfeiture context, the issue of forfeiture vel non is an issue for the jury, not the court. Reflection on that point establishes to this court's satisfaction that despite the fact that the proof necessary to the forfeiture (beyond what is necessary for the CCE conviction itself) is proof that goes to punishment and not to an element of the crime as stated in Hernandez-Escarsega, the time to present the proof was at trial to the jury. Given this court's application of the bifurcation concept that required the Government to put on its proof of forfeiture

before the jury retired to consider the CCE verdict, and given the failure of proof; it follows that defendant is entitled to a judgment of acquittal as to the forfeiture of the Cabin, Tract A, the Inlet View Lots, the Rabbit Creek Lot, the Sky Harbor Lot, and the Aircraft.

The judgment of acquittal as to these properties provides the judgment required to allow the application of issue preclusion to prevent the government from contesting Plunk's claim in the existing civil forfeiture against the Aircraft (although technically, to obtain relief it will be necessary for Plunk to present this defense in the civil action). It also provides the basis for a double jeopardy defense in the event that the Government later brings a second criminal prosecution which seeks to forfeit any of the properties as to which proof failed at the trial in this matter. However, there is no such prosecution now pending so there is no proceeding in which to find that double jeopardy presently applies. It must be emphasized that this double jeopardy bar would be limited to an effort to forfeit the Cabin, Tract A, the Inlet View Lots, the Rabbit Creek Lot, the Sky Harbor Lot, and the Aircraft. This court is of the view that there was ample evidence to convict on the CCE and to forfeit the Currency, Plunk's Residence, and the Lodge.

C. Government's Motion

The Government moves, pursuant to Fed. R. Cr. P. 48(a), for dismissal of the Court 2, the CCE Count, as well as Counts 10 (one of the distribution counts) and 12 (the Alaska conspiracy) on which the jury was unable to reach a unanimous verdict. Under Fed. R. Cr. P. 48(a), a dismissal requires approval by the court. Rule 48(a) is applicable to post-trial motions to dismiss. United States v. Weber, 721 F.2d 266, 269 (9th Cir. 1983). Dismissal should be approved

unless dismissal is clearly contrary to the public interest, would contribute to harassment of the defendant by the prosecutor, or has not been requested in good faith. See United States v. Wallace, 848 F.2d 1464, 1468 (9th Cir. 1988); Wright, Federal Practice & Procedure: Criminal 2d, §§ 811-812.

The Government has represented to the court (and will be bound by the representation) that if the convictions on the other counts are affirmed it will not prosecute Plunk again on Counts 2, 10, and 12. However, if there was error in the trial which results in a reversal, then the Government will seek to re-try Plunk on all of the charges. It is not clearly contrary to the public interest to proceed in the fashion which the Government advocates. Indeed, what the Government proposes is the course most consistent with the public's interest in a judicial process that is both fair and efficient. Similarly, the Government's plan does not constitute harassment of Plunk. Rather, when viewed in context with the judgment of acquittal as to the forfeiture of certain properties, it assures him of the least burdensome disposition of the charges consistent with the Government's right to prosecute all of the charges in the superseding indictment. Finally, there is no doubt that the Government's request is made in good faith, because double jeopardy considerations prevent the Government from proceeding immediately to trial on the CCE count.

CONCLUSION

For the reasons set forth above: (1) Plunk's motion at dockets 382/403 is **GRANTED** to the extent that judgment of acquittal as to the forfeiture of certain of the properties will be entered, and the Government's motion at docket 394 is **GRANTED**, counts 2, 10, and 12 will be **DISMISSED** pursuant to Fed. R. Cr. P. 48(a).

DATED this 15th day of November 1996 at Anchorage, Alaska.

/s/

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
SEP 18 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWELVE PIECES OF REAL PROPERTY, ET AL.,	) CA No. 98-35702) CA No. 98-36055
Defendant/Appellant,	) DCNo.CV-96-00335-JWS
v.	) Alaska (Anchorage)
UNITED STATES OF AMERICA,	
Plaintiff/Appellee.	

NOTICE OF STIPULATION TO PARTIAL SETTLEMENT OF FORFEITED PROPERTY

COME NOW Plaintiff/Appellee United States of America and Defendant/Appellant, Gerald Frank Plunk, by and through their respective counsel, who stipulate as follows:

This is a consolidated appeal of the judicial forfeiture of the following items of real and personal property:

a. 1986 Arrow Gare Seahawk, No. N76KD,

b. 1967 U206B Cessna No. N4994F,

c. *1975* Supercub No. N4545B,

d. 1964 206 Cessna No. *N5217U,*

e. One heat sealed bag of approximately $5,000.00 in U.S. Currency,

f. Property described as $50,000.00 in U.S. Currency,

g. Cabin with acreage more fully described as Ti 7NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182 ("Hock Lake")

h. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1; Lot 10 Block 1; Lot 11 Block 1; Lot 7 Block *5;* Lot 8 Block *5;* Lot *5* Block 6; Lot 6 Block 6; Lot 7 Block 6; and

1. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon.

The parties have executed a settlement agreement[1] which reduces the contested res in this action to only the following four items of real and personal property:

[1] The parties express their gratitude to the 9th Circuit mediator Chris Goelz for assisting them in reaching partial settlement.

a. Cabin with acreage more fully described as Ti 7NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182 ("Hock Lake property"),

b. 1975 Supercub No. N4545B,

c. One heat sealed bag of approximately $5,000.00 in U.S. Currency, and

d. property described as $50,000.00 in U.S. Currency. The validity of the forfeiture of these four assets remains in contention on appeal. The validity of the forfeiture of all the above-referenced property other than the above-listed four assets is no longer at issue in this appeal.

The United States and Appellant Gerald R. Plunk will request renewed briefing in light of the parties' settlement.

Respectfully submitted this 14th day of September 2001 at Anchorage, Alaska.

/S/
TIMOTHY M. BURGESS
United States Attorney

/S/
JAMES BARKLEY
Assistant U.S. Attorney

For Appellant Gerald Plunk:

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendant Properties
and Gerald Frank Plunk

/S/
Phillip Paul Weidner

SEP 18, 2001

SETTLEMENT AGREEMENT

It is hereby stipulated by and between the United States appellee, and Gerald Plunk, appellant ("Plunk"), by and through their respective attorneys as follows:

1. The parties do hereby agree to settle and compromise part of the action entitled, Twelve Pieces of Real Property. et al. v. United States of America, CA No. 98-35702 and CA No. 98-36055 under the terms and conditions set forth herein.

2. The United States of America, plaintiff/appellee, agrees to pay to Plunk the sum of Three Hundred Fifty Thousand and NO/100 Dollars ($ 350,000.00), which sum shall be in full and final settlement and satisfaction of any and all civil claims, demands, rights, and causes of action of whatsoever kind and nature, arising from the forfeiture of the following items:

a. 1986 Arrow Gare Seahawk, No. N76KD,

b. 1967 U206B Cessna No. N4994F,

c. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1; Lot 10 Block 1; Lot 11 Block 1; Lot 7 Block 5; Lot 8 Block 5; Lot 5 Block

6; Lot 6 Block 6; Lot 7 Block 6; and

d. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon, and

e. 1964 206 Cessna No. NS217U, for which Plunk or his heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plunk and his heirs, executors, administrators or assigns hereby agree to accept the sum of Three Hundred Fifty Thousand and NO/100 Dollars ($ 350,000.00), in full settlement and satisfaction of any and all civil claims, demands, rights, and causes of action of whatsoever kind and nature, arising from the forfeiture of the following items:

a. 1986 Arrow Gare Seahawk, No. N76KD,

b. 1967 U206B Cessna No. N4994F,

c. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1; Lot 10 Block 1; Lot 11 Block 1; Lot 7 Block 5; Lot 8 Block 5; Lot 5 Block 6; Lot 6 Block 6; Lot 7 Block 6; and

d. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon, and

e. 1964 206 Cessna No. N5217U.

Plunk and his heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such civil causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of civil claims arising from said forfeitures, by Plunk or his heirs, executors, administrators or assigns against any third party or against the United States.

4. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States or Plunk, nor their agents, servants, or employees, and is entered into by both parties for the purpose of compromising disputed civil claims and avoiding the expenses and risks of further litigation.

5. The parties agree that the validity of the forfeiture of the following property remains contested on appeal:

a. Cabin with acreage more fully described as T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182 ("Hock Lake property"),

b. 1975 Supercub No. N4545B,

c. One heat sealed bag of approximately $5,000.00 in U.S. Currency, and

d. property described as $50,000.00 in U.S. Currency

Nothing in this Settlement Agreement is hereby meant to prejudice, compromise or otherwise affect the positions of the parties in the litigation as to the validity of the forfeiture of those items.

6. It is also agreed, by and among the parties, that the settlement amount of Three Hundred Fifty Thousand and NO/100 Dollars ($ 350,000.00) represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys fees owed will be paid out of the settlement amount and not in addition thereto.

7. Payment of the settlement amount will be made by electronic transfer of Three Hundred Fifty Thousand and no/100 Dollars ($350,000.00) from the Treasury of the United States of America to the attorney trust account of Plunk's attorney, Phillip Paul Weidner. Said account is at Key Bank National Association, in Anchorage, Alaska in the name of Phillip Paul Weidner & Associates A.P.C., Trust Account Routing #125200879/Account #01 006 913 5. The funds will be wire transferred to Plunk's attorney in said account, who agrees to distribute the settlement proceeds to the benefit of Plunk.

8. In consideration of the payment of the sum of Three Hundred Fifty Thousand and NO/100 Dollars ($350,000.00) set forth above, Plunk agrees that he will cause his attorney to execute the Notice of Stipulation to

Partial Settlement of Forfeited Property.

For the Appellee United States of America:

9/17/01
Date

/S/
TIMOTHY M. BURGESS
United States Attorney

9/14/01
Date

/S/
JAMES BARKLEY
Assistant U.S. Attorney

For Appellant Gerald Plunk:

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendant Properties
and Gerald Frank Plunk
/S/
Phillip Paul Weidner

9/14/01
Date

Lodged
JUL 22 1998

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant u.s. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY ET AL.	)
	)
Defendant.	)
	)

Case No. A96 335 CV
Consol. (JWS)

FINAL DECREE OF FORFEITURE

A Verified Complaint for Forfeiture of four (4) aircraft was filed on September 8, 1994, alleging that the defendant aircraft represented proceeds traceable to an

exchange for a controlled substance in violation of 21 U.S. C. §§ 801 et seq. and were therefore subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(6); and a Verified Complaint for Forfeiture of Twelve Pieces of Real Property, et al. was filed on September 16, 1996, alleging that the defendant real and personal properties represented proceeds traceable to the exchange of a controlled substance, and/or were used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. § 801 et seq., and were involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. § 1956(a) (1) (B) (i), making the defendant real and personal properties subject to forfeiture to the United States pursuant to 21 U.S.C. § 881 (a) (6) and/or (7), and 18 U.S.C. § 981(a) (1) (A).

It appearing that process was fully issued in this action and returned according to law;

Warrants of Arrest In Rem were issued on September 9, 1994, for the arrest of a 1986 Arrow Gare Seahawk, No. N76KD, a 1967 U206B Cessna No. N4994F, a 1975 Supercub No. N4545B, and a 1964 206 Cessna No. N52J.7u. Warrants of Arrest ~ Rem were issued on September 17, 1996, as to property described as one heat sealed bag of approximately $5,000.00 in U.S. Currency, and property described as $50,000.00 in U.S. Currency.

Warrants of Arrest In Rem were issued on September 30, 1996, as to the following described defendant real properties:

a. 14940 Longbow Drive, Anchorage, Alaska legally described as Timberlux Subdivision 4*3, Block F, Lot 3;

b. Cabin with acreage more fully described as T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land

Survey No. 76-182

c. **12.32** acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1, Lot 10 Block 1, Lot 11 Block 1, Lot 7 Block 5, Lot 8 Block 5, Lot 5 Block 6, Lot 6 Block 6, Lot 7 Block 6; and

d. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon.

On October 11, 1996, the plaintiff dismissed from the Complaint the real property described as **14940 Longbow Drive, Anchorage, Alaska,** legally described as Timberlux Subdivision #3, Block F, Lot 3.

A Notice of Claim was filed by Gerald Frank Plunk on September 23, 1994, and a Protected Verified Claim on November 20, 1996.

A Protected Answer was filed by Gerald Frank Plunk On March 14, 1997.

In August 1995, Robert McAmis filed a Lienholder Petition, and a Verified Answer on March 12, 1997.

No other claim or answer was filed in this case pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims.

On July 7, 1997, this Court ordered the consolidation for all purposes of Case No. A94-041 Civil and Case No. A96-335 CV.

On July 15, 1998, this Court granted plaintiff's Motion for Summary Judgment.

NOW, THEREFORE, on motion of the Plaintiff, United States of America, for a decree of forfeiture, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant real and personal property be forfeited to the United States of America, and no right, title or interest in the property shall exist in any other party. The United States Marshal's Service is directed to pay any and all costs associated with the defendant property and to dispose of the defendant property according to law.

DATED this 26 day of August, 1998, in Anchorage, Alaska.

/S/
UNITED STATES DISTRICT JUDGE

A9[illegible]0335—CV (JWS)
P. WEIDNER (WEIDNER
W. ARTUS (ARTUS)
E. O'LEARY (US-ATTNY)

U.S. MARSHALL

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant Plunk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
	)
TWELVE PIECES OF REAL PROPERTY, et al.,	)
	)
	)
Defendant.	)
	)

Case No. A94-0335 Civil (JWS)

NOTICE OF FILING OF PROTECTED CLAIM OF OWNERSHIP AND/OR RIGHT TO RESTITUTION AND/OR TO DEFEND

COMES NOW Gerald Frank Plunk, by and

through his attorney, Phillip Paul Weidner, and hereby gives notice pursuant to Federal Rules of Civil Procedure 55(b), 60, 62(d) and Rule C(6) of the Supplemental Rules of Certain Admiralty and Maritime Claims that he is filing herewith a formal claim of ownership and/or right to restitution and/or right to defend as to the property the subject of this action, except for the currency.

This claim and this notice are made pursuant to pending Motions to Dismiss for Lack of Jurisdiction and further Pending Requests to Extend Time in Which to File a Claim and For a Stay and For an Order Regarding Simmons/use Immunity and Other Relief and further is made at this time in order to perfect the record so as to assert the defenses of collateral estoppel, issue preclusion, res judicata and double jeopardy given the ruling by the Honorable John W. Sedwick, United States District Court Judge in United States v. Plunk, Case No. A94-0036 CR (JWS) (Exhibit A herewith) which granted a judgment of acquittal and other relief as to certain of said properties.

The claim of ownership and this notice are further made pursuant to Mr. Plunk and his counsel's understanding that they are constitutionally protected under the doctrines set out in United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), the Ninth Circuit unpublished opinion in the interlocutory appeal in United States v. Plunk, Case No. A94-0036 CR (JWS) and Simmons v. United States, 390 U.S. 37 (1968).

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendant Plunk

By: /S/
Phillip Paul Weidner

THIS IS TO CERTIFY THAT on the
20 day of November, 1996, a true
and correct copy of the foregoing
was delivered by hand/facsimile on:

Elizabeth S. O'Leary
U.S. Department of Justice
U.S. Attorney's Office
222 W. 7th Ave. #9, Room 253
Anchorage, AK 99513-7567

/S/

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
Plaintiff,	)
vs.	)
TWELVE PIECES OF REAL PROPERTY, et al.,	)
Defendants.	)

Case No. A96-335 Civil (JWS)

RESPONSE TO AND/OR OBJECTION TO PLAINTIFFS' REQUEST T ENTER DEFAULT AND ATTACHED DECLARATION

COMES NOW the above referenced real property listed as in rem defendants and further Gerald Frank Plunk the alleged owner of said property by and through counsel, PHILLIP PAUL WEIDNER of Phillip Paul Weidner &

Associates, Inc., a Professional Corporation, and hereby responds and objects to the Request to Enter Default and Attached Declaration dated October 29, 1996 filed herein by Elizabeth S. O'Leary.

Said response and objection based on the following grounds:

1. The Request and Declaration are procedurally and factually incorrect insofar as reflected by the record in point of fact within ten days of service said parties by and through counsel filed an appropriate Notice of Challenge to Jurisdiction of the Court and Motion to Dismiss for Lack of Jurisdiction and for Stay of Proceedings;

2. Said Request and Declaration are factually and legally incorrect insofar as under Rule 55(b) of the Federal Rules of Civil Procedure judgment by default may be entered only by the Court in a matter of this nature insofar as the plaintiffs' claim is not for a sum certain and "in all other cases the party entitled to a judgment by default shall apply to the court therefore";

3. Neither the Court nor the Clerk has jurisdiction to enter default in this matter insofar as reflected by the above referenced Notice of Challenge to Jurisdiction of the Court and Motion to Dismiss for Lack of Jurisdiction and for Stay of Proceedings given the pending criminal matter of United States v. Plunk, Case No. A-94-0036 CR (JWS) jurisdiction lies in said criminal matter and not in the instant civil matter;

4. In compliance with Supplemental Rule C(6) within ten days after process was served on the above referenced properties and/or Mr. Plunk and/or Mr. Weidner appropriate requests were made for an additional time to file a claim.

Accordingly, neither the Court nor the Clerk should enter a default, and rather, the Court should rule on the Notice of Challenge to Jurisdiction of the Court and Motion to Dismiss for Lack of Jurisdiction and for Stay of

Proceedings and should either dismiss for lack of jurisdiction, or should stay the proceedings, or at a minimum should allow appropriate further time under Supplemental Rule C(6) to file a claim with a specific order that said claim is protected under Simmons v. United States as to Mr. Plunk's rights against self-incrimination under the United States and Alaska Constitutions.[2]

RESPECTFULLY submitted this 1st day of November, 1996.

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendants

By: /S/
Phillip Paul Weidner

THIS IS TO CERTIFY THAT on the 1st day of November, 1996, a true and correct copy of the foregoing

---

[2] Note that it appears that while requesting and obtaining via nonopposition by Mr. Weidner an extension of the time in which to respond to the Notice of Challenge to Jurisdiction of the Court and Motion to Dismiss for Lack of Jurisdiction and for Stay of Proceedings Ms. O'Leary went forward and filed the Request to Enter Default and Attached Declaration including swearing under oath at paragraph nine "Declarant knows of no reason why a default against the defendant property and all other persons and entities having an interest in the defendant property should not now be entered." notwithstanding the division of Rule 55(a) of the Federal Rules of Civil Procedure which indicates that a default shall be entered only "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . ." (emphasis added).

was delivered by hand/mail on:

Elizabeth S. O'Leary, Asst. U.S. Attorney
U.S. Department of Justice
U.S. Attorney's Office
222 W. 7th Ave., Room 253, #9
Anchorage, AK 99513-7567

/s/

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY, et al.,	)
	)
Defendants.	)

Case No. A96-335 Civil (JWS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONSE TO AND/OR OBJECTION TO PLAINTIFFS' REQUEST TO ENTER DEFAULT AND ATTACHED DECLARATION

As reflected by the record, within 9 days of service on Mr. Plunk and Mr. Weidner of a Verified Complaint for Forfeiture and related documents, Mr. Weidner filed on behalf of the subject properties and Mr. Plunk, alleged owner of same, certain pleadings entitled Notice of Challenge to Jurisdiction of the Court and Motion to Dismiss for Lack of

Jurisdiction and for Stay of Proceedings, Memorandum of Points and Authorities in Support of Motion for Stay of Proceedings, and Affidavit in Support of Notice of Challenge to Jurisdiction of the Court and Motion for Stay of Proceedings.

Said documents challenge the jurisdiction of this court given the fact that in the pending criminal matter United States v. Plunk, Case No. A94-0036 CR (JWS) the court still has under advisement a Motion for Judgment Acquittal as to forfeiture of certain properties including the subject properties, and further appellate proceedings are contemplated from same. Accordingly, jurisdiction does not even lie with the court to proceed with the instant action insofar as jeopardy attached in the above referenced criminal matter, including the criminal complaint for forfeiture which was tried before a jury as to said real properties and further as noted there is a pending Motion for Judgment of Acquittal in that regard.

Moreover, Mr. Weidner likewise requested that "at a minimum the court . . . issue an order directing that no sworn claim under Federal Rules of Civil Procedure Supplemental Rule C(6) or answer need be filed until after the completion of said criminal matters and appeals."

This request was made in part due to the fact that filing a claim at this junction might intend to incriminate Mr. Plunk given the nature of the allegations and the superseding indictment in the criminal matter and given the Government's express position as to whether or not retrial would be sought as to referenced charges, and given their position as demonstrated at the criminal trial. Thus it is clear that at the time the request for a stay and/or dismissal was made.

Again, at a minimum, in light of United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), and the interlocutory appeal in United States v. Plunk, Case No. A94-0036 CR (JWS), a stay should be granted and/or an extension of time

should be granted in which to file a claim until after the completion of the criminal proceedings or a clear order should be entered and/or agreed to by the government that any such claim or proceedings in this matter may not be used against Mr. Plunk in the criminal matter in light of Simmons v. United States, and the holding in Cretacci relating to Simmons use immunity.

While the Government sought a nonopposition to the extension of time in which to file the said pleadings it appeared to nonetheless go forward and request a clerk to issue a default without notifying the clerk of the pending proceedings.

This procedure is factually and procedurally incorrect. Rule 55 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules . . . the clerk shall enter the party's default.

Obviously Mr. Weidner's filing in the above referenced matter constitutes actions taken to "otherwise defend" and thus default should not be granted.

Further, Rule 55(b)(1) provides in pertinent part that judgment may be entered by the clerk "when the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain . . ." Rule 55(b)(2) provides "In all other cases the party entitled to judgment by default shall apply to the court therefore."

Accordingly it is procedurally wrong to apply to the clerk as opposed to the court for said default. Note further that not only is Ms. O'Leary's affidavit in error when it

states that she "knows of no reason why a default against the defendant property and all other persons and entities having an interest in the defendant property should not now be entered" insofar as it omits reference to the pending Notice of Challenge to Jurisdiction of the Court and Motion to Dismiss for Lack of Jurisdiction and for Stay of Proceedings and Request for Extension of Time Period in Which to File a Claim, but further is factually incorrect when she swears at paragraph seven that Mr. Weidner received service "on September 8, 1996". Given the fact that the complaint was filed on September 16, 1996 obviously this is an error and service was in fact made on October 8, 1996.

SUMMARY AND CONCLUSIONS

Accordingly and for the foregoing reasons, default should not be entered either by the clerk or the Court and the Court should either grant the challenge of jurisdiction and dismiss for lack of jurisdiction or should stay the proceedings pending final completion of the related criminal matters and related appellate matters or at a minimum issue an order directing on the no sworn claim under Supplemental Rule C(6) no answer need be filed until after the completion of said criminal matters and appeals.

If the Court will not stay proceedings and/or delay the finding of a claim until after the completion of criminal matters and appeals, then it should rule clearly under United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) and United States v. Plunk, Case No. A94-0036 CR (JWS), that Simmons use immunity applies and allow that the subject properties and Mr. Plunk, alleged owner of same, to file a claim subject to Simmons use immunity.

RESPECTFULLY submitted this 1st day of November, 1996.

WEIDNER & ASSOCIATES, INC.
Attorneys for Defendants

By: _____/S/_____
Phillip Paul Weidner

THIS IS TO CERTIFY THAT on the
1st day of November, 1996, a true
and correct copy of the foregoing
was delivered by hand/mail on:

Elizabeth S. O'Leary, Asst. U.S. Attorney
U.S. Department of Justice
U.S. Attorney's Office
222 W. 7th Ave., Room 253, #9
Anchorage, AK 99513-7567

_____

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant u.s. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE	)

FULLY DESCRIBED AS INLET VIEW SUBDIVISION, MATSU BOROUGH, ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6; .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA; ANY AND ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 IN U.S. CURRENCY; AND ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY, IN REM,

Defendants.

Case No. A96 335 CIV

VERIFIED COMPLAINT FOR FORFEITURE

COMES NOW the United States of America, by and through counsel, and respectfully states as follows:

1. This is a civil in rem action brought to enforce the provisions of 21 U.S.C. § 881(a) (6) and/or (7) for the forfeiture of real and personal property which constitutes proceeds traceable to the exchange of controlled substances in violation of Title II of the Controlled Substances Act, 21 U.S.C. §5 301 e~. sect., and/or which was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §5 801 et sea., punishable by more than one year's imprisonment, and/or to enforce the provisions of 18 U.S.C. §981(a) (1) (A) for the forfeiture of real and personal property due to its involvement in a financial transaction or

attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. § 1956(a) (1) (B) (i).

2. This Court has jurisdiction over this matter by virtue of 28 U.S.C. §5 1345 and 1355.

3. The defendant properties consist of the following pieces of real properties known as:

a. 14940 Longbow Drive, Anchorage, Alaska legally described as Timberlux Subdivision, Addition #3, Block F, Lot 3;

b. Cabin with acreage more fully described as T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77—49, Alaska State Land Survey No. 76—182;

c. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1, Lot 10 Block 1, Lot 11 Block 1, Lot 7 Block 5, Lot 8 Block 5, Lot 5 Block 6, Lot 6 Block 6, Lot 7 Block 6; and

d. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska. with all appurtenances and improvements thereon, and any and all proceeds from the sale of said property; and personal property of:

a. $50,000 in United States currency which represents the sale proceeds of all right, title or interest of Gerald Frank Plunk in Big Mountain Lodge, Inc. to Phillip Paul Weidner; and

b. one heat sealed bag of approximately $5,000 in United States currency seized at 14940 Longbow Drive, Anchorage, Alaska.

4. The defendant properties represent proceeds and/or proceeds traceable to the exchange of a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. §5 801 et sea., and/or were used or intended to be used in any manner or part to commit or to facilitate the

commission of a violation of 21 U.S.C. §5 801 et sea., punishable by more than one year's imprisonment, and/or constitute real and personal property involved in a financial transaction or attempted transaction which represent the proceeds of a specified unlawful activity in violation of 18 U.S.C. § 1956(a) (1) (B) (i), making these defendant properties subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and 18 U.S.C. § 981(a) (1) (A).

5. The facts and circumstances supporting the arrest and seizure of the defendant properties are more fully set forth in the Affidavit of Special Agent Terence M. Zeznock of the Internal Revenue Service, which is attached hereto and fully incorporated herein by reference.

WHEREFORE, the United States prays that warrants of arrest in rem for the defendant real property:

a. 14940 Longbow Drive, Anchorage, Alaska,

b. Cabin with acreage more fully described as T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77—49, Alaska State Land Survey No. 76—182,

c. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1, Lot 10 Block 1, Lot 11 Block 1, Lot 7 Block 5, Lot 8 Block 5, Lot 5 Block 6, Lot 6 Block 6, Lot 7 Block 6,

d. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon; and seizure warrants and warrants for arrest in rem for the defendant personal property of:

a. $50,000 in United States currency which represents the sale proceeds of all right, title or interest of Gerald Frank Plunk in Big Mountain Lodge,

Inc. to Phillip Paul Weidner,

b. one heat sealed bag of approximately $5,000 in United States currency seized at 14940 Longbow Drive, Anchorage, Alaska, be issued;

2. That due notice be given to all parties to appear and show cause why the forfeiture should not be decreed;

3. That judgment be entered declaring the defendant properties together with all appurtenances and improvements thereon, be condemned and forfeited to the United States of America for disposition according to law; and

4. That the United States of America be granted such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

RESPECTFULLY SUBMITTED this 16 day of September, 1996, at Anchorage, Alaska.

ROBERT C. BUNDY
UNITED STATES ATTORNEY

/S/
ELIZABETH S. O'LEARY
Assistant U.S. Attorney

VERIFICATION

I am a Special Agent with the Internal Revenue Service and am currently assigned to the District of Alaska in Anchorage, Alaska.

I have read the contents of the foregoing complaint f or forfeiture, and the affidavit attached thereto, and the statements contained therein are true to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16 day of September, 1996.

/S/
TERENCE M. ZEZNOCK
Special Agent
Internal Revenue Service

SUBSCRIBED AND SWORN to before me on this 16 day of September, 1996, at Anchorage, Alaska.

/S/
NOTARY PUBLIC, State of Alaska
My Commission expires _____

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE	)

FULLY DESCRIBED AS INLET VIEW)
SUBDIVISION, MATSU BOROUGH,)
ALASKA: LOT 2 BLOCK 1, LOT 10)
BLOCK 1, LOT 11 BLOCK 1, LOT 7)
BLOCK 5, LOT 8 BLOCK 5, LOT 5)
BLOCK 6, LOT 6 BLOCK 6, LOT 7)
BLOCK 6; .60 ACRES OF UNIMPROVED)
REAL PROPERTY LOCATED AT RABBIT)
CREEK HEIGHTS BLOCK 4 LOT 6,)
ANCHORAGE, ALASKA; ANY AND ALL)
PROCEEDS FROM THE SALE OF SAID)
PROPERTY; $50,000 IN U.S.)
CURRENCY; AND ONE HEAT SEALED)
BAG OF APPROXIMATELY $5,000 IN)
U.S. CURRENCY, IN REM)
)
Defendants.)
)

Case No. A96— 335 CIV

AFFIDAVIT OF TERENCE M. ZEZNOCK

STATE OF ALASKA)
)ss.
THIRD JUDICIAL DISTRICT)

I, Terence M. Zeznock, being first duly sworn upon oath, depose and state:

PRELIMINARY MATTERS

1. I am a Special Agent with the Internal Revenue Service, Criminal Investigation Division, and have been so employed in this capacity since April 1984. My responsibilities include the investigation of possible criminal violations of Internal Revenue Laws (Title 26, United States

Code), Bank Secrecy Act (Title 31, United States Code), the Money Laundering Control Act (Title 18, United States Code), and related offenses.

2. I have personally conducted and assisted in investigations of alleged violations of the Internal Revenue Laws, the Money Laundering Control Act, and the Bank Secrecy Act. Those investigations have included individuals deriving income from illegal sources.

3. I have attended various in—service training seminars which concentrated on "Tax Havens", the Bank Secrecy Act, and the Money Laundering Control Act.

4. I have assisted in the investigation of Title 21 U.S.C. § 801 et. seq. offenses, including illegal drug dealers of numerous controlled substances such as cocaine, heroin, and marijuana.

5. I know that persons involved in large scale drug trafficking conceal in their residences stashes of drugs, large amounts of currency, financial instruments, precious metals, jewelry and other items of value, and/or proceeds from drug transactions, and evidence of financial transactions relating to the obtaining, transferring, secreting or spending large sums of money made from engaging in narcotics trafficking activities. Drug traffickers al~o utilize wall and floor safes, safety deposit boxes, rental storage units, and hidden compartments in residences to conceal their monies, assets, and documents.

6. I know that persons conceal money, guns, drugs, and other paraphernalia in their vehicles.

7. The information in this affidavit comes from the investigation by, and written reports of, agents from the Internal Revenue Service and the Drug Enforcement Administration. The information is based on personal observations of those agents except where otherwise indicated. Those observations and the logical inferences to be drawn from those facts, support the conclusion that Gerald Frank Plunk, as outlined in this affidavit, has been

involved in cocaine trafficking in violation of 21 U.S.C. § 801, et seq. and/or 18 U.S.C. § 1956.

INVESTIGATION

8. On December 12, 1993, Hal Booher was arrested in the Newark, New Jersey area. Booher was in possession of 220 kilos of cocaine. The cocaine was found inside a motor home driven by Booher.

9. On March 1, 1994, Hal Booher was debriefed by agents of the Drug Enforcement Administration (DEA).

10. Booher stated that in April 1993, Gerald Frank Plunk visited at Booher's residence in New Mexico. Plunk told Booher he had traveled to Venezuela and been smuggled into Colombia. Plunk had ridden via black Land Rovers with armed guards to a ranch where they met unnamed members of the Cali Cartel. Plunk stated he had been initially recruited to assist in the transportation of cocaine, which would arrive in Alaska, and then be transported to the Lower 48. Later the Colombians altered their plan, and recruited Plunk to assist in transporting cocaine that arrived in the United States at Los Angeles, California or Houston, Texas.

11. Plunk offered Booher employment as a domestic drug courier. Plunk told Booher that he could earn $20,000 to $30,000 per load that he transported, and that he would transport cocaine from Los Angeles, California or Houston, Texas to New Jersey. The payment for that transportation would come from another part of the organization, meaning the Cali Cartel.

12. Plunk agreed to provide Booher with money to buy a recreational vehicle to be used in hauling cocaine. Booher agreed to the proposal.

13. In August 1993, Booher received via UPS or Federal Express at his home in Columbus, New Mexico, a package containing $17,000 in U.S. Currency. Booher used

the money to buy a pickup truck and a fifth wheel recreational trailer. Booher made two trips hauling cocaine with that truck and trailer. Due to difficulty of driving that truck and trailer, Plunk provided Booher with an additional $8,000 so that Booher could trade in the fifth wheel trailer on a Jayco motor home.

14. Plunk told Booher that he had flown a load of cocaine from California to New Jersey in a Piper Navajo aircraft in the summer of 1993.

15. In August 1993, Booher received a telephone call at his home from Frank Plunk. Booher was instructed to travel to Los Angeles, California and check into the Howard Johnson hotel in Monrovia, California. Plunk met Booher at the hotel.

16. The following morning at 8:00 a.m. Plunk drove the "load car" from where it was parked to the fifth wheel trailer. Booher loaded the cocaine from the "load car" into the fifth wheel trailer himself. The cocaine was contained in ten to twelve gym bags, each weighed approximately 40 pounds. Plunk gave Booher the following instructions.

A. Don't drive after dark.
B. Don't speed.
C. Provide Plunk with a status report every afternoon.
D. Advise Plunk within 24 hours of the destination of Secaucus, New Jersey.
E. Advise Plunk of delivery with a pager signal (555).
F. Advise Plunk of pickup and start of trip with pager signal (200) or (250).
G. If arrested, a lawyer from New York will assist. Don't make any deals with government attorneys.

17. Booher contacted Plunk within 24 hours from Secaucus, New Jersey. Plunk instructed Booher to check into

the Embassy Suites Hotel in Harmon Meadows, New Jersey. Booher was contacted by a fair Latin female named Erica (last name unknown) who claimed to be Venezuelan. Booher delivered the cocaine to a vehicle provided by Erica. Booher stated he made seven or eight trips hauling cocaine for Plunk between August and December 1993.

18. In April 1994, a reliable source of information (SQl) was interviewed by agents of the DEA. He/she provided information concerning his/her relationship with Gerald Frank Plunk.

19. The 501 stated he/she became involved with cocaine in 1980. shortly thereafter, he/she was introduced to Frank Plunk. Plunk became his/her exclusive source for the purchase of cocaine. The SQl shortly thereafter began selling cocaine until 1982.

20. During 1983, Plunk again became the SQl's source of supply for cocaine. He/she continued using and selling cocaine until 1992.

21. In April 1993, Frank Plunk, from his home, telephoned the SQl. Plunk offered the 501 a proposition to make a lot of money. The SQl indicated he/she was interested.

22. On the following day, Plunk met with the SQl in person. Plunk explained that the work consisted of transporting cocaine across the United States in a motor home.

23. Plunk indicated he was also involved in air smuggling across the United States.

24. Plunk explained to the SQl that he (Plunk) had recently traveled to Venezuela where he had met with members of the Cali Cartel. The cocaine transportation business that he was involved in was for the Cali Cartel. The SQl made four transcontinental trips to deliver multi-kilo loads of cocaine for Plunk.

25. On March 18, 1994, another Source of Information (S012) was interviewed by agents of DEA,

Anchorage. This 5012 admitted to being the facilitator of cocaine transactions between Plunk and Warren Jeff Funderburk. The S012 would pick up money from Funderburk and deliver it to Frank Plunk at his (Plunk's) residence at 14940 Long Bow Drive, Anchorage, Alaska. Plunk would give the cocaine to the S012 at the time the money was delivered. The S012 would then deliver the cocaine to Funderburk at his residence.

26. Booher also stated that between 1986 and about March of 1993, he sold five aircraft to Plunk: one Supercub for $36,000; two 182 Cessna Wrens, each for $40,000; one Seahawk for $30,000; and an additional Cessna 182 for $42,000. Each time Plunk paid Booher the full price in cash. The Cessna 182 sold by Booher to Plunk for $42,000 in cash is registered in the name of William Plunk.

27. On April 26, 1991, records of the Federal Aviation Administration (FAA) were searched. Three planes were found registered in the name of Gerald F. Plunk, 14940 Longbow Drive, Anchorage, Alaska:

a. The first is a 1974 Supercub, PA 18, identification number N4545B. FAA records contain a bill of sale dated February 15, 1986, that transfers title of this aircraft from Hal E. Booher to Gerald F. Plunk. This aircraft was registered to Gerald F. Plunk on December 1, 1986;

b. The second aircraft is a 1967 U206B Cessna, identification number N4994F. FAA records contain a bill of sale dated March 16, 1989, that transfers title of this aircraft from Monroe L. DuBois of Homestead, Florida, to Plunk; and

c. The third airplane is a 1986 Arrow Gare Seahawk, identification number N76KD. (FAA records reflect that this aircraft is a 1986 Seahawk, but the Appraisal Report identifies this aircraft as a 1978). FAA records indicate that this aircraft was transferred from Hal E. Booher to Gerald F. Plunk. This aircraft was registered to Gerald Plunk on January 5, 1993.

28. A fourth aircraft was identified as registered to Allison W. Plunk, 14940 Longbow Drive, Anchorage, Alaska 99516. That aircraft is a 1965 206 Cessna, identification number N5217UJ.

29. In April 1994, records were received from aircraft mechanic Russell Smoot. Included were an aircraft bill of sale for a Cessna 206, registration number N5272U. The purchaser was listed as: Plunk, Allison W., 114940 Longbow Drive, Anchorage, Alaska. The aircraft was purchased on March 27, 1993.

30. On April 28, 1994, Robert McAmis was contacted by an agent of the Internal Revenue Service. Robert McAmis stated he had sold the salvage of a Cessna 206, Tail Number N5217U to Gerald Frank Plunk. Robert McAmis identified a receipt reflecting Frank Plunk had purchased a Cessna U206, identification number N5217U for $10,000 as partial payment, and the remaining $5,000 due. He stated that the bill of sale information was made out in Allison Plunk's name. From the date of sale, McAmis has completely reconstructed the aircraft at Plunk's request. Including the purchase price, McAmis had billed Plunk approximately $69,000 for the work he has performed. Gerald Frank Plunk delivered payments for the work done on the aircraft, most of which were in cash.

31. McAxnis dealt mostly with Gerald Frank Plunk during the repair and refurbishing of the aircraft. He received a number of payments for his work on the aircraft:

a. March 3, 1992, McAmis received $5,000;

b. April 3, 1992, an additional $5,000 was received by McAiuis for payment for flaps and ailerons;

c. April 20, 1992, McAmis received $5,000 in cash;

d. May 27, 1992, $5,000 in cash;

e. June 20, 1992, $3,000 in cash;

f. August 6, 1992, $5,000 in cash;

g. August 27, 1992, $3,500 in cash was received by Jacqueline McAmis, Robert McAmis' wife;

h. September 14, 1992, Jacqueline McAmis received $5,000 in cash; and

i. October 25, 1992, Robert McAmis received $2,000 cash.

At least one additional payment of $3,500 was received.

32. On March 24, 1994, Allison Plunk, wife of Gerald F. Plunk, told agents at the DEA that the aircraft which is in her name, is not hers, that she has no claim to title, and that it was placed in her name by her husband, Gerald F. Plunk.

33. On April 28, 1994, the records of the FAA were searched. Those records reflected that on February 4, 1991, a Cessna 182A, Tail Number N13 HE, aircraft was transferred from Hal E. Booher and titled in the name of William G. Plunk, 205 Pineapple street, Satellite Beach, Florida.

34. On April 26, 1994, William G. Plunk was interviewed by agents of the DEA. William Plunk told the agents that the Cessna 182A, N13HE, was not his aircraft. The aircraft belonged to his son, Gerald F. Plunk.

35. During April 1994, the federal Individual Income Tax Returns of Gerald Frank Plunk were reviewed. The major source c~ income on those returns for the years 1988 through 1992 was from "construction." That income is reflected on Plunk's returns on a Schedule C, (Profit and Loss from Business and Profession). Plunk has reported income only from this activity with minor expenses for legal and professional services:

a. for 1988, Plunk reported construction related income of $61,305;

b. for 1989, $65,405;

c. for 1990, $74,158;

d. for 1991, $99,163;

e. for 1992, $78,137.

During the tax year 1987, Plunk reported no income from construction or gainful employments. Income figures were based on capital gains. However, the total adjusted gross income for the return is a negative $29,846.

In 1986, Plunk reported $114,422 on a Schedule C, (Profit and/or Loss from Business or Profession) with only $1,400 in expenses.

36. On April 19, 1994, Stanley Peterson, CPA, was interviewed. Peterson told agents of the Internal Revenue Service and DEA that he was personally familiar with Plunk. He had been a social as well as business acquaintance.

37. Mr. Peterson's firm was responsible for the preparation of the tax returns of Gerald Frank Plunk from the years 1980 through 1992. Peterson understood that Plunk was employed by Durafort Construction. He was employed by this company on a contract labor basis. Peterson questioned Plunk concerning expenses that would be applied toward the income he was receiving. Plunk informed him that his expenses were covered by Durafort Construction. Peterson never became aware of where Durafort Construction was located. He was, however, repeatedly given the name of Mr. Robertson as being a principal in the company.

38. The Schedule C gross income figures were arrived at by Plunk reviewing his check register for deposits, and providing individual deposit amounts to Peterson, who added them up and placed a total on the tax return. Periodically Plunk would call and provide additional income, which was to be included on the Schedule C, Profit and Loss from Business and Profession.

39. In April Tim Robertson told DEA agents that he joined Frank Plunk, Andy Chamkas and Michael Dennis in forming Durafort Construction in 1982. That business operated under the business license of Robertson. Durafort

Construction was started with the proceeds of cocaine sales. Durafort Construction built two houses and one duplex during 1982 and made a small profit for the year. During the winter of 1982 Robertson left Durafort Construction and took his contractor's license with him.

40. Robertson told DEA agents he knew that Plunk was involved with cocaine since 1980. Plunk quit his job at Japan airlines and moved into his residence on Longbow in 1982.

41. I know from my training and experience in investigation of income tax and narcotics cases that individuals are aware that once income is deposited into bank accounts, it is easily traceable.

42. Records of Internal Revenue Service show Durafort Construction Inc. obtained an employer identification number in July 1993. Internal Revenue Service records reflect no return being filed after 1988. A certification of lack of records for the returns of 1989, 1990, 1991 and 1992 has been supplied by the Internal Revenue Service.

43. On April 29, 1994, a search was made of public records for a business license for Durafort Construction Inc. No record of such a business license was found.

44. On April 29, 1994, a search of public records concerning corporations in Alaska was made. No record of Durafort Construction was found in those records.

45. In or about 1986, Gerald Frank Plunk, John Timothy Pierson and Dan Salmon created Big Mountain Lodge. Since then, Plunk bought out both of his partners' interest. In April 1995, while a defendant in Criminal Case No. A94-036 CR, and pursuant to a Court approved "Stipulated Agreement of Sale of and Substitution of Sale Proceeds for Defendant's Interest in Big Mountain Lodge and Order", Plunk agreed to sell all current, continuing and/or future right, title and interest Plunk had in Big Mountain Lodge, Inc. to his attorney, Phillip Paul Weidner

for $50,000. It was further agreed that the $50,000 sale proceeds would be seized by the United States and substituted for all such right, title and interest of Plunk in the Lodge.

46. Based upon my review of records and interviews of persons involved with Big Mountain Lodge, I believe that Big Mountain Lodge has operated at a loss for every year of operation with the possible exception of the summer of 1993.

47. In the 1994 Superseding Indictment (A94-036 CR) of Gerald Frank Plunk, it is stated in Count 1, Part C. Methods and Means, paragraph 4: "It was . . . part of the conspiracy to disguise the true nature of cross—country trips by having the drivers pass out brochures and video tapes describing defendant PLUNK'S 'BIG MOUNTAIN LODGE' located near Illiamna, Alaska."

48. In the 1994 Superseding Indictment (A94—036 CR) of Gerald Frank Plunk, it is stated in Part C. Methods and Means, paragraph 9: "It was a part of the conspiracy that PLUNK would purchase commercial heat sealing machines through BIG MOUNTAIN LODGE and distribute them to the Colombians for the purpose of packaging proceeds (cash) from the distribution of cocaine".

49. In the 1994 Superseding Indictment (A94-036 CR) of Gerald Frank Plunk, it is stated in Part C. Methods and Means, paragraph 10: "It was further part of the conspiracy that PLUNK would often pay drivers with vacuum packed envelopes of cash".

50. During the criminal trial of Gerald Frank Plunk, testimony indicated that Plunk utilized Big Mountain Lodge to make telephone calls to and take telephone calls from the drivers that transported cocaine.

51. A review of State of Alaska Recorders Office records reflect that P.E.D.I., a partnership for which Frank Plunk has been listed as a general partner, purchased lots in Inlet View Subdivision. Those lots were purchased between

approximately September 1982 and April 1983. Lots 2, 10 and 11 of Block 1, Lots 7 and 8 of Block 5, and Lots 4, 6 and 7 of Block 6 were particularly identified. Title to those lots was transferred to Gerald Frank Plunk Revocable Trust during 1992 and 1993.

52. Carr-Gottstein Properties, 640). A Street, Anchorage, Alaska, was determined to have been the mortgage holders for Lots 2, 10 and 11 of Block 1, Lots 7 and 8 of Block 5 and Lots 5, 6, and 7 of Block 6. In July 1996, an employee of Carr-Gottstein Properties stated that the mortgages had been paid off and deeds of reconveyance sent to the Plunk Trust.

53. A review of State of Alaska Recorder's Office records reflect that Frank Plunk purchased in November 1984, Tract A, Alaska State Land Survey No. 76—182, Filed under Plat Number 77-49 in Anchorage Recording District. Tract A was transferred to the Plunk Trust in June 1992. A search was made and no mortgage was found on the property.

54. A review of State of Alaska Recorder's Office records reflect that Durafort Construction Inc. purchased Lot 6 of Block 4 in the Rabbit Creek Heights Subdivision in August 1985. A search was made and no mortgage was found on the property.

55. A review of State of Alaska Recorder's Offices records reflect that Frank Plunk and Andy Chamkas purchased Lot 3 of Block F of the Timberlux Subdivision, Addition No. 3, Plat 71-240 in October 1981. Subsequently Andy Chamkas deeded his interest in the property to Frank Plunk.

56. I know from my training and experience that individuals involved in distributing cocaine and related illegal financial transactions use nominee names to hold property to avoid detection by law enforcement officials.

57. On August 15, 1996, Gerald Frank Plunk was convicted in the United States District Court for the District

of Alaska, of:

a. Count 1: Conspiracy to Distribute Cocaine;

b. Counts 3, 4, 5, and 6: Conspiracy to distribute cocaine by use of a communication device to facilitate his drug trafficking;

c. Count 11: Knowing and intentional distribution of approximately 220 kilograms of cocaine.

58. The facts, information, and circumstances described above demonstrate that Gerald Frank Plunk was involved in the possession, importation, and/or distribution of cocaine in violation of 21 U.S.C. § 841, and financial transactions in violation of 18 U.S.C. § 1956 in Anchorage, Alaska. Further, that based upon the foregoing, I have probable cause to believe, and do believe that Gerald Frank Plunk committed violations of the law as above—described, that the real and personal property described above in paragraphs 43, 46, 49, 51, 52, and 53 represent the proceeds from those activities, proceeds traceable to the exchange of controlled substances in violation of Title II of the Controlled Substances Act, 21 U.S.C. §~ 801 et sea., and/or were used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §~ 801 et sea., and/or 18 U.S.C. § 1956, and as such, are subject to forfeiture pursuant to 21 U.S.C. § 881 and 18 U.S.C. § 981.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/S/
Terence M. Zeznock, Special Agent

SUBSCRIBED AND SWORN to before me this 16th day of September, 1996.

/S/
Notary Public for Alaska
My commission expires 3/12/97

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE	)

FULLY DESCRIBED AS INLET VIEW SUBDIVISION, MATSU BOROUGH, ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6; .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA; ANY AND ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 IN U.S. CURRENCY; AND ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY, IN REM

Defendants.

Case No. A96— 335 CIV

SEIZURE WARRANT AND IN REM WARRANT OF ARREST (FOR THE PROPERTY DESCRIBED AS ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY)

TO: THE UNITED STATES MARSHALS SERVICE FOR THE DISTRICT OF ALASKA:

WHEREAS, a Verified Complaint for Forfeiture was filed in the United States District Court for the District of Alaska, alleging that the defendant property described as **ONE HEAT SEALED BAG OF**

APPROXIMATELY $5,000 IN U.S. CURRENCY, constitutes proceeds and/or proceeds traceable to an exchange for a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. 801 et. sea., and/or was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §~ 801, et sea., punishable by more than one year's imprisonment, and/or constitutes property involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. §1956(a) (1) (B) (i) and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and or 18 U.S.C. § 981(a) (1) (A).

AND, the Court being satisfied that based upon the verified complaint for forfeiture and the supporting affidavit attached thereto, there is probable cause to believe that the above—described defendant property is subject to seizure and forfeiture, and that grounds for application for issuance of an seizure warrant exist, title having vested in the United States by operation of law. 21 U.S.C. § 881(h).

YOU ARE, THEREFORE, HEREBY COMMANDED to seizure and arrest said property, to prepare a written inventory of the property seized, and to maintain custody of said property as provided by 19 U.S.C. § 1605 until further order of this court, respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to maintain and exercise dominion and control over said defendant property.

YOU ARE FURTHER COMMANDED TO POST upon said defendant property notice of such arrest at the time thereof;

AND FURTHER, TO SERVE upon the owner of record thereof, a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain

Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of arrest.

AND UPON APPLICATION of the Plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

YOU ARE ALSO COMMANDED to give due notice to all persons and entities having an interest in the defendant property under seizure by publication in a newspaper of general circulation in the judicial district where the defendant property was seized.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said defendant property shall file their claims with the Clerk of Court, United States District Court, District of Alaska, 222 West 7th Avenue, #4, Anchorage, Alaska, 99513-7564, within ten (10) days after the execution of the Warrant or notice of this arrest, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Also pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, persons claiming an interest in said property shall serve and file their answers within twenty (20) days after the filing of the claim with the Clerk of Court, United States District Court, with a copy thereof sent to Assistant United States Attorney Elizabeth S. O'Leary, United States Attorney's Office, 222 West 7th Avenue, #9, Room C-253, Anchorage, Alaska 99513-7567.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §~ 1602—1619, and Title 21, United States Code of Federal Regulations (C.F.R.), Sections 1316.71—1316.18.

DATED this day17th of September, 1996 at Anchorage, Alaska.

/S/
UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth S. O'Leary (AUSA)

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE FULLY DESCRIBED AS INLET VIEW SUBDIVISION, MATSU BOROUGH,	)

ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6; .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA; ANY AND ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 IN U.S. CURRENCY; AND ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY, IN REM

Defendants.

Case No. A96— 335 CIV

SEIZURE WARRANT AND IN REM WARRANT OF ARREST (FOR THE PROPERTY DESCRIBED AS $50,000 IN U.S. CURRENCY)

TO: THE UNITED STATES MARSHALS SERVICE FOR THE DISTRICT OF

ALASKA:

WHEREAS, a Verified Complaint for Forfeiture was filed in the United States District Court for the District of Alaska, alleging that the defendant property described as $50,000 IN U.S. CURRENCY, constitutes proceeds and/or proceeds traceable to an exchange for a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. 801 et. sea., and/or was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. g~ 801,

~ sea., punishable by more than one year's imprisonment, and/or constitutes real property involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. §1956(a) (1) (B) (i) and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and or 18 U.S.C. § 981(a) (1) (A).

AND, the Court being satisfied that based upon the verified complaint for forfeiture and the supporting affidavit attached thereto, there is probable cause to believe that the above—described defendant property is subject to seizure and forfeiture, and that grounds for application for issuance of an seizure warrant exist, title having vested in the United States by operation of law. 21 U.S.C. § 881(h).

YOU ARE, THEREFORE, HEREBY COMMANDED to seizure and arrest said property, to prepare a written inventory of the property seized, and to maintain custody of said property as provided by 19 U.S.C. § 1605 until further order of this court, respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to maintain and exercise dominion and control over said defendant property.

YOU ARE FURTHER COMMANDED TO POST upon said defendant property notice of such arrest at the time thereof;

AND FURTHER, TO SERVE upon the owner of record thereof, a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of arrest.

AND UPON APPLICATION of the Plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

YOU ARE ALSO COMMANDED to give due notice to all persons and entities having an interest in the defendant property under seizure by publication in a newspaper of general circulation in the judicial district where the defendant property was seized.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said defendant property shall file their claims with the Clerk of Court, United States District Court, District of Alaska, 222 West 7th Avenue, #4, Anchorage, Alaska, 99513—7564, within ten (10) days after the execution of the Warrant or notice of this arrest, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Also pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, persons claiming an interest in said property shall serve and file their answers within twenty (20) days after the filing of the claim with the Clerk of Court, United States District Court, with a copy thereof sent to Assistant United States Attorney Elizabeth S. O'Leary, United States Attorney's Office, 222 West 7th Avenue, #9, Room C—253, Anchorage, Alaska 99513— 7567.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §~ 1602—1619, and Title 21, United States Code of Federal Regulations (C.F.R.), Sections 1316.71—1316.18.

DATED this 17th day of September, 1996 at Anchorage, Alaska.

/S/
UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth S. O'Leary (AUSA)

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE	)

FULLY DESCRIBED AS INLET VIEW SUBDIVISION, MATSU BOROUGH, ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6; .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA; ANY AND ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 IN U.S. CURRENCY; AND ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY, IN REM

Defendants.

Case No. A96— 335 CIV

IN REM WARRANT OF ARREST (FOR THE PROPERTY DESCRIBED AS .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6. ANCHORAGE • ALASKA)

TO: THE UNITED STATES MARSHALS SERVICE FOR THE DISTRICT OF ALASKA:

WHEREAS, a Verified Complaint for Forfeiture was filed in the United States District Court for the District of Alaska, alleging that the defendant real property described as .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA,

constitutes proceeds and/or proceeds traceable to an exchange for a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. 801 et. sea., and/or was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §~ 801, et sea., punishable by more than one year's imprisonment, and/or constitutes real property involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. § 1956(a) (1) (B) (i) and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and or 18 U.S.C. § 981(a) (1) (A).

AND, the Court being satisfied that based upon the verified complaint for forfeiture and the supporting affidavit attached thereto, there is probable cause to believe that the above—described defendant real property is subject to arrest and forfeiture, and that grounds for application for issuance of an arrest warrant exist, title having vested in the United States by operation of law. 21 U.S.C. § 881(h).

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest said real property, enter the interior of any and all buildings, appurtenances, and improvements, including any and all dwellings for the purpose of determining by inspection, the physical condition of the property at the time of the arrest, to ensure the absence of any safety hazards and to prepare a written inventory and appraisal of the property arrested until further order of this court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to inventory, appraise and protect the Government's interest in said property, its appurtenances and improvements thereon.

YOU ARE FURTHER COMMANDED TO POST upon said defendant property notice of such arrest at

the time thereof;

AND FURTHER, TO SERVE upon the owner of record thereof, a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of arrest.

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

YOU ARE ALSO COMMANDED to give due notice to all persons and entities having an interest in the defendant property under arrest by publication in a newspaper of general circulation in the judicial district where the defendant property was arrested.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said defendant property shall file their claims with the Clerk of Court, United States District Court, District of Alaska, 222 West 7th Avenue, #4, Anchorage, Alaska, 99513—7564, within ten (10) days after the execution of the Warrant or notice of this arrest, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Also pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, persons claiming an interest in said property shall serve and file their answers within twenty (20) days after the filing of the claim with the Clerk of Court, United States District Court, with a copy thereof sent to Assistant United States Attorney Elizabeth S. O'Leary, United States Attorney's Office, 222 West 7th Avenue, #9, Room C—253,

Anchorage, Alaska 99513— 7567.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §~ 1602-1619, and Title 21, United States Code of Federal Regulations (C.F.R.), Sections 1316.71—1316.18.

DATED this 30th day of September, 1996 at Anchorage, Alaska.

/S/
UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth S. O'Leary (AUSA)

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE	)

FULLY DESCRIBED AS INLET VIEW)
SUBDIVISION, MATSU BOROUGH,)
ALASKA: LOT 2 BLOCK 1, LOT 10)
BLOCK 1, LOT 11 BLOCK 1, LOT 7)
BLOCK 5, LOT 8 BLOCK 5, LOT 5)
BLOCK 6, LOT 6 BLOCK 6, LOT 7)
BLOCK 6; .60 ACRES OF UNIMPROVED)
REAL PROPERTY LOCATED AT RABBIT)
CREEK HEIGHTS BLOCK 4 LOT 6,)
ANCHORAGE, ALASKA; ANY AND ALL)
PROCEEDS FROM THE SALE OF SAID)
PROPERTY; $50,000 IN U.S.)
CURRENCY; AND ONE HEAT SEALED)
BAG OF APPROXIMATELY $5,000 IN)
U.S. CURRENCY, IN REM)
)
Defendants.)
)

Case No. A96— 335 CIV

IN REM WARRANT OF ARREST (FOR THE PROPERTY DESCRIBED AS TIMBERLUX SUBDIVISION. ADDITION #3. BLOCK F. LOT 3. ALSO KNOWN AS 14940 LONGBOW DRIVE)

TO: THE UNITED STATES MARSHALS SERVICE FOR THE DISTRICT OF

ALASKA:

WHEREAS, a Verified Complaint for Forfeiture was filed in the United States District Court for the District of Alaska, alleging that the defendant real property described as 14940 **LongboW Drive, Anchorage, Alaska legally described *as* Timberlux Subdivision, Addition #3, Block F, Lot 3)** constitutes proceeds and/or

proceeds traceable to an exchange for a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. 801 et. ~ and/or was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §~ 801 et ~q., punishable by more than one year's imprisonment, and/or constitutes real property involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. §1956(a) (1) (B) (i) and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and or 18 U.S.C. § 981(a) (1) (A).

AND, the Court being satisfied that based upon the verified complaint for forfeiture and the supporting affidavit attached thereto, there is probable cause to believe that the above—described defendant real property is subject to arrest and forfeiture, and that grounds for application for issuance of an arrest warrant exist, title having vested in the United States by operation of law. 21 U.S.C. § 881(h).

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest said real property, enter the interior of any and all buildings, appurtenances, and improvements, including any and all dwellings for the purpose of determining by inspection, the physical condition of the property at the time of the arrest, to ensure the absence of any safety hazards and to prepare a written inventory and appraisal of the property arrested until further order of this court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to inventory, appraise and protect the Government's interest in said property, its appurtenances and improvements thereon.

YOU ARE FURTHER COMMANDED TO POST upon said defendant property notice of such arrest at the time thereof;

AND FURTHER, TO SERVE upon the

owner of record thereof, a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil procedure, within a reasonable time of arrest.

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

YOU ARE ALSO COMMANDED to give due notice to all persons and entities having an interest in the defendant property under arrest by publication in a newspaper of general circulation in the judicial district where the defendant property was arrested.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said defendant property shall file their claims with the Clerk of Court, United States District Court, District of Alaska, 222 West 7th Avenue, #4, Anchorage, Alaska, 99513-7564, within ten (10) days after the execution of the Warrant or notice of this arrest, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Also pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, persons claiming an interest in said property shall serve and file their answers within twenty (20) days after the filing of the claim with the Clerk of Court, United States District Court, with a copy thereof sent to Assistant United States Attorney Elizabeth S. O'Leary, United States Attorney's Office, 222 West 7th Avenue, #9, Room C-253, Anchorage, Alaska 99513-7567.

Additional procedures and regulations regarding this

forfeiture action are found at 19 U.S.C. §~ 1602—1619, and Title 21, United States Code of Federal Regulations (C.F.R.), Sections 1316.71—1316.18.

DATED this 30th day of September, 1996 at Anchorage, Alaska.

/S/
UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth S. O'Leary (AULA)

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE	)

FULLY DESCRIBED AS INLET VIEW SUBDIVISION, MATSU BOROUGH, ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6; .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA; ANY AND ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 IN U.S. CURRENCY; AND ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY, IN REM

Defendants.

Case No. A96— 335 CIV

IN REM WARRANT OF ARREST(FOR THE PROPERTY DESCRIBED AS T17NR5W.SECTION 33. SEWARD PRIME MERIDIAN. ALASKA. TRACT A. PLAT 77-49. ALASKA STATE LAND SURVEY NO. 76-3.82 WITH CABIN)

TO: THE UNITED STATES MARSHALS SERVICE FOR THE DISTRICT OF ALASKA:

WHEREAS, a Verified complaint for Forfeiture was filed in the United States District Court for the District of Alaska, alleging that the defendant real property described as T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH

CABIN, constitutes proceeds and/or proceeds traceable to an exchange for a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. 801 et. sea., and/or was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §~ 801, ~ sea., punishable by more than one year's imprisonment, and/or constitutes real property involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. §1956(a) (1) (B) (i) and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and or 18 U.S.C. § 981(a) (1) (A).

AND, the Court being satisfied that based upon the verified complaint for forfeiture and the supporting affidavit attached thereto, there is probable cause to believe that the above—described defendant real property is subject to arrest and forfeiture, and that grounds for application for issuance of an arrest warrant exist, title having vested in the United States by operation of law. 21 U.S.C. § 881(h).

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest said real property, enter the interior of any and all buildings, appurtenances, and improvements, including any and all dwellings for the purpose of determining by inspection, the physical condition of the property at the time of the arrest, to ensure the absence of any safety hazards and to prepare a written inventory and appraisal of the property arrested until further order of this court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to inventory, appraise and protect the Government's interest in said property, its appurtenances and improvements thereon.

YOU ARE FURTHER COMMANDED TO POST upon said defendant property notice of such arrest at the time thereof;

AND FURTHER, TO SERVE upon the owner of record thereof, a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of arrest.

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

YOU ARE ALSO COMMANDED to give due notice to all persons and entities having an interest in the defendant property under arrest by publication in a newspaper of general circulation in the judicial district where the defendant property was arrested.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said defendant property shall file their claims with the Clerk of Court, United States District Court, District of Alaska, 222 West 7th Avenue, #4, Anchorage, Alaska, 99513-7564, within ten (10) days after the execution of the Warrant or notice of this arrest, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Also pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, persons claiming an interest in said property shall serve and file their answers within twenty (20) days after the filing of the claim with the Clerk of Court, United States District Court, with a copy thereof sent to Assistant United States Attorney Elizabeth S. O'Leary, United States Attorney's Office, 222 West 7th Avenue, #9, Room C—253, Anchorage, Alaska 99513— 7567.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. § 1602—1619, and Title 21, United States Code of Federal Regulations (C.F.R.), Sections 1316.71—1316.18.

DATED this 30th day of September, 1996 at Anchorage, Alaska.

/S/
UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth S. O'Leary

Lodged
SEP 16 1996

ROBERT C. BUNDY
United States Attorney

ELIZABETH S. O'LEARY
Assistant u.s. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271—5071

Counsel for plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TWELVE PIECES OF REAL PROPERTY WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, LOCATED IN ALASKA AND KNOWN AS: TIMBERLUX SUBDIVISION, ADDITION #3, BLOCK F, LOT 3, ALSO KNOWN AS 14940 LONGBOW DRIVE; T17NR5W, SECTION 33, SEWARD PRIME MERIDIAN, ALASKA, TRACT A, PLAT 77-49, ALASKA STATE LAND SURVEY NO. 76-182 WITH CABIN; 12.32 ACRES OF UNIMPROVED REAL PROPERTY, MORE FULLY DESCRIBED AS INLET VIEW	)

SUBDIVISION, MATSU BOROUGH, ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6; .60 ACRES OF UNIMPROVED REAL PROPERTY LOCATED AT RABBIT CREEK HEIGHTS BLOCK 4 LOT 6, ANCHORAGE, ALASKA; ANY AND ALL PROCEEDS FROM THE SALE OF SAID PROPERTY; $50,000 IN U.S. CURRENCY; AND ONE HEAT SEALED BAG OF APPROXIMATELY $5,000 IN U.S. CURRENCY, IN REM,

Defendants.

Case No. A96 335 CIV

IN REM WARRANT OF ARREST (FOR THE PROPERTY DESCRIBED AS 12.32 ACRES OF UNIMPROVED REAL PROPERTY. MORE FULLY DESCRIBED AS INLET VIEW SUBDIVISION. MATSU BOROUGH. ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1. LOT 12. BLOCK 1.~~LOT 7. BLOCK 5. LOT 8 BLOCK 5. LOT 5 BLOCK 6. LOT 6 BLOCK 6, LOT 7 BLOCK 6)

TO: THE UNITED STATES MARSHAL SERVICE FOR THE DISTRICT OF ALASKA:

WHEREAS, a Verified Complaint for Forfeiture was filed in the United States District Court for the District of Alaska, alleging that the defendant real property described as **12.32 ACRES OF UNIMPROVED**

REAL PROPERTY, MORE FULLY DESCRIBED INLET VIEW SUBDIVISION, MATSU BOROUGH, ALASKA: LOT 2 BLOCK 1, LOT 10 BLOCK 1, LOT 11 BLOCK 1, LOT 7 BLOCK 5, LOT 8 BLOCK 5, LOT 5 BLOCK 6, LOT 6 BLOCK 6, LOT 7 BLOCK 6, constitutes proceeds and/or proceeds traceable to an exchange for a controlled substance in violation of Title II of the Controlled Substance Act, 21 U.S.C. 801 et. ~ and/or was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §~ 801, ~ punishable by more than one year's imprisonment, and/or constitutes real property involved in a financial transaction or attempted transaction which represents the proceeds of a specified unlawful activity in violation of 18 U.S.C. §1956(a) (1) (B) (i) and is, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a) (6) and/or (7), and or 18 U.S.C. § 981(a) (1) (A).

AND, the Court being satisfied that based upon the verified complaint for forfeiture and the supporting affidavit attached thereto, there is probable cause to believe that the above—described defendant real property is subject to arrest and forfeiture, and that grounds for application for issuance of an arrest warrant exist, title having vested in the United States by operation of law. 21 U.S.C. § 881(h).

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest said real property, enter the interior of any and all buildings, appurtenances, and improvements, including any and all dwellings for the purpose of determining by inspection, the physical condition of the property at the time of the arrest, to ensure the absence of any safety hazards and to prepare a written inventory and appraisal of the property arrested until further order of this court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to inventory, appraise and protect the Government's interest in said property, its

appurtenances and improvements thereon.

YOU ARE FURTHER COMMANDED TO POST upon said defendant property notice of such arrest at the time thereof;

AND FURTHER, TO SERVE upon the owner of record thereof, a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of arrest.

AND UPON APPLICATION of the Plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

YOU ARE ALSO COMMANDED to give due notice to all persons and entities having an interest in the defendant property under arrest by publication in a newspaper of general circulation in the judicial district where the defendant property was arrested.

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said defendant property shall file their claims with the Clerk of Court, United States District Court, District of Alaska, 222 West 7th Avenue, #4, Anchorage, Alaska, 99513-7564, within ten (10) days after the execution of the Warrant or notice of this arrest, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Also pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, persons claiming an interest in said property shall serve and file their answers within twenty (20) days after the

filing of the claim with the Clerk of Court, United States District Court, with a copy thereof sent to Assistant United States Attorney Elizabeth S. O'Leary, United States Attorney's Office, 222 West 7th Avenue, #9, Room C-253, Anchorage, Alaska 99513-7567.

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. § 1602—1619, and Title 21, United States Code of Federal Regulations (C.F.R.), Sections 1316.71—1316.18.

DATED this 30th day of September, 1996 at Anchorage, Alaska.

/S/
UNITED STATES MAGISTRATE JUDGE

cc: Elizabeth S. O'Leary (AUSA)

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I voluntarily surrendered myself in the

instant criminal matter on or about March 25, 1994 and was arrested.

2. At the time of my arrest I was wearing a Rolex watch which, upon information and belief, is the watch the subject of Seizure No. 152090, Case No. RG940002.

3. I was initially told by the marshals that I could remove my watch and give it to my attorney, Mr. Bryson.

4. The watch was then taken by a DEA agent.

5. After repeated inquiries by me and/or my attorney concerning said watch, I received notice of administrative forfeiture of the watch.

6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold and guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me,

the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I am the defendant in United States v. Plunk, Case No. A94-036 (JWS).

2. I am tendering this affidavit in support

of my Motion to Bar Further Prosecution on the Grounds of Double Jeopardy.

3. By tendering this affidavit, I do not intend to make any limited or general waiver of my right to remain silent or against self-incrimination under the United States constitution or my rights to confidentiality of attorney/client communications.

4. It is my knowledge and belief that pursuant to the search warrant executed on my personal residence at 14940 Longbow Drive, Anchorage, Alaska, nine firearms were seized.

5. I obtained the following seized firearms from individuals who the government has informed me are cooperating witnesses in the case against me:

a. Ruger 22 mm: gift from David Nova.

b. Colt 45: purchased from Hal Booher.

6. I purchased the Wilding 475 pistol through my son-in-law, Michael Frizzell.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner

Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT PLUNK'S MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

PHILLIP PAUL WEIDNER, being first duly sworn under oath, deposes and states:

1. I am the attorney of record for the defendant Gerald Frank Plunk in the instant matter.

2. This affidavit is submitted in support of the defendant's pending Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy/Notice of Objection on Double Jeopardy Grounds to Further Proceedings and/or Jury Trial, and is not intended or made as any limited or general waiver of his rights to remain silent and against self-incrimination under the United States Constitution, or his rights to confidentiality of attorney/client privileges under same.

3. I was Mr. Plunk's attorney of record at the time of the return of the superseding indictment herein, and further, his attorney of record at the time of two detention hearings, and further, reviewed a transcript of the initial detention hearing held when Mr. Plunk was previously represented by William P. Bryson.

4. I was attorney of record for Mr. Plunk in the instant matter when he was served with and brought to my attention notice of seizures in Seizure Nos. 1521831, 152199, and 152824 relating to items allegedly seized from his alleged residence at 14940 Long Bow Drive, Anchorage, Alaska at the time of service of a search warrant herein.

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food saving" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112), and further based upon my understanding that

the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

Phillip Paul Weidner

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

Notary Public in and for the
State of Alaska
My Commission Expires: 7/25/97

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, 3 SMALL PLASTIC BAGS
ID#:
VALUE: $967.89
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK
SEIZED FROM: PLUNK, GERALD FRANK, INMATE
JUDICIAL DIST: ALASKA

DATE:
AUGUST 19, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA

BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY
ID#:
VALUE: $9660.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK, INMATE NO.:
SEIZED FROM: PLUNK, GERALD FRANK
JUDICIAL DIST: ALASKA

DATE:
JUNE 24, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA

BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS
ID#:
VALUE: $4040.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK INMATE #760
JUDICIAL DIST: ALASKA

DATE:
JUNE 10, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA

BY: AEB AD CODE #: 242

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: ROLEX WRIST WATCH, ROLEX OYSTER
ID#:
VALUE: $1500.00
SEIZURE DATE: 25 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK (INMATE #7603)
JUDICIAL DIST: ALASKA

DATE:
JUNE 3, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 241
DEA.294 (MAR.92)

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY

VALUE: $9660.00
SEIZURE DATE: 94 MAR 24 152199
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER: *
JUDICIAL DIST: ALASKA
BOND REQUIRED: $966 152199
DATE OF THIS LETTER: 09 MAY 94
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152199B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81,

procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in court. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim.** Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, VALUE: $967.89

VALUE: $967.89
SEIZURE DATE: 94 MAR 24 152824B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 09 MAY 94 152824B
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152824B

NOTICE OF SEIZURE

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procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the follc[illegible] procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

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U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS, VALUE: $4,040.00

VALUE: $4040.00
SEIZURE DATE: 94 MAR 24 152183B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $404
DATE OF THIS LETTER: 25 APR 94 152183B
DATE OF FIRST PUBLICATION: 94 MAY 04

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152183B

NOTICE OF SEIZURE

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1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in court. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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TO CONTEST THE FORFEITURE

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U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: 1 ROLEX WRIST WATCH, VALUE: $1,500.00
SERIAL'S #9378785, #168000
VALUE: $1500.00
SEIZURE DATE: 94 MAR 25 152090B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 18 APR 94 152090B
DATE OF FIRST PUBLICATION: 94 APR 27

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152090B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-

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ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Apr 26 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By ___ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A94-036 CR
Plaintiff,	) **COUNT 1** **CONSPIRACY TO DISTRIBUTE COCAINE**
vs.	
GERALD FRANK PLUNK, aka "FRANK", aka "EL FEO" AND TIMOTHY PIERSON, aka "TIM" aka "MR. T."	) Vio. Title 21 U.S.C. §841(a)(1) and 846
	) **COUNT 2** **CONTINUING CRIMINAL ENTERPRISE**
Defendants.	) Vio. Title 21 U.S.C. §848
	COUNT 3-8 **USE OF COMMUNICATION FACILITY** Vio. Title 21 U.S.C. § 843(b)

COUNT 9-11
POSSESSION WITH INTENT TO DISTRIBUTE
Vio. Title 21 U.S.C. § 841(a)(1)

COUNT 12
CONSPIRACY TO DISTRIBUTE COCAINE
Vio. Title 21 U.S.C. § 846 and 841(a)(1)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
aka "FRANK"
aka EL FEO
AND
TIMOTHY PIERSON
aka "TIM"
aka "MR. T."

the defendants herein, and other persons whose names are known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to

commit offenses against the United States, that is to distribute in excess of 2000 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A. **OBJECTIVES OF THE ORGANIZATION**

1. One objective of the organization was the possession of controlled substances (cocaine) with the intent to distribute the cocaine within the United States.

2. Another objective of the organization was the transportation of loads of cocaine from the Los Angeles, California and the Houston, Texas areas to New Jersey on behalf of the Colombian Cali Cartel.

3. The primary objective of the organization was the distribution of multi-kilogram loads of cocaine for financial gain.

B. **THE PARTICIPANTS IN THE ORGANIZATION**

The organization consisted of numerous individuals aligned in various sub-groups all working toward the common objective of distributing cocaine for financial gain.

1. JACO, aka EL COMPADRE, a Colombian National living in Colombia was the principal organizer, supervisor and manager of the organization. His job was the transportation of cocaine into the United States and the ultimate supervision of the distribution of the cocaine throughout the United States.

2. LEON ALBERTO MALCA, aka JAMES, aka RICKI (hereinafter JAMES) (charged elsewhere) was a principal supervisor in New York who coordinated the Colombian and North American distribution of multi-kilo loads of cocaine.

3. GERALD FRANK PLUNK, aka FRANK, aka FEO, (hereinafter PLUNK) was the principal organizer, supervisor and manager of the interstate transportation of

multi-kilo loads of cocaine. He was responsible for establishing a transportation network from the Southern borders of the United States to the New Jersey area.

4. JOHN TIMOTHY PIERSON, aka MR. T., (hereinafter PIERSON) was initially a driver for PLUNK but later became responsible for the transportation network when law enforcement began investigating PLUNK.

5. Tony, aka, Alphonse, supervised the storage of cocaine in Los Angles [sic], California.

6. CARLOS ANDRES SERRATO (charged elsewhere) and MIGUEL ANGEL VILLALKA (charged elsewhere) delivered vehicles loaded with cocaine to predesignated locations to be off-loaded by the drivers initiating their cross-country travel.

7. ELBA DUENAS, aka ERICA (charged elsewhere) delivered empty vehicles from New York to predesignated locations in New Jersey to enable cross-country drivers to off-load their cocaine shipments into the vehicles. She sometimes delivered cocaine proceeds to BARRY TENDLER.

8. BARRY TENDLER aka THE BEAR, (charged elsewhere) assisted PLUNK in the delivery of cocaine to drivers in Los Angeles and participated in the distribution of payments to the drivers and the receipt of drug proceeds.

9. HAL BOOHER aka PANCHO (charged elsewhere) was an interstate driver who utilized a trailer and a motorhome to transport approximately 1225 kilos of cocaine between Los Angeles, Houston, and New Jersey.

10. CISCO and D.D., unindicted co-conspirators, were interstate drivers hired by PLUNK to transport approximately 1775 kilos of cocaine from Los Angeles and Houston to New Jersey, utilizing motorhomes and trucks.

C. **METHODS AND MEANS**

1. It was a part of the conspiracy that the participants of the organization employed code names, and communicated by code through the use of Sky Talk and Sky Page and cellular phones to avoid detection by law enforcement as they communicated their cocaine transportation messages.

2. It was a part of the conspiracy to use recreational-type vehicles to transport kilo loads of cocaine across country.

3. It was a part of the conspiracy that PLUNK would provide the currency to purchase the vehicles used for transporting cocaine.

4. It was a further part of the conspiracy to disguise the true nature of cross-country trips by having the drivers pass out brochures and video tapes describing defendant PLUNK's "BIG MOUNTAIN LODGE" located near Illiamna, Alaska.

5. It was a part of the conspiracy that after being told where to begin the journey, the drivers would load boxes or duffel bags of cocaine into waiting vehicles and travel across the United States to New Jersey.

6. It was a part of the conspiracy that upon arrival in New Jersey, drivers were notified that certain empty vehicles were waiting to be filled with the cocaine.

7. It was a further part of the conspiracy that throughout the journey and upon its completion, the drivers communicated by telephone and pager with defendant PLUNK who informed James of their progress.

8. It was a part of the conspiracy that El Compadre in Colombia would speak directly to James about the transactions, and that James would repeat portions of their conversations to PLUNK and that James would repeat similar conversations of PLUNK's to El Compadre.

9. It was a part of the conspiracy that PLUNK would purchase commercial heat sealing machines through

BIG MOUNTAIN LODGE and distribute them to the Colombians for the purpose of packaging proceeds (cash) from the distribution of cocaine.

10. It was a further part of the conspiracy that PLUNK would often pay drivers with vacuum packed envelopes of cash.

11. It was further part of the conspiracy that defendant PIERSON was to assume the role of transportation supervisor of the cocaine distribution when James and PLUNK feared the police were investigating PLUNK.

12. Finally, it was a part of the conspiracy that drivers were instructed how to avoid detection on their cross-country trips and instructed that they would be provided a "family doctor" (signifying a lawyer) in the event they were arrested.

D. **OVERT ACTS**

In furtherance of the conspiracy and to achieve the objects thereof the following over [sic] acts were committed:

1. On or about the first week of April 1993, PLUNK travelled [sic] to South America to meet with members of the Cali Cartel to discuss transporting cocaine into Alaska as well as across the United States.

2. On or about April 15, 1993, PLUNK traveled to Seattle, Washington to hire a driver to transport cocaine.

3. On or about April 26, 1993, PLUNK purchased a motorhome in Eagle River, Alaska for the purpose of transporting cocaine.

4. On or about June 4, 1993, PLUNK and Tendler arrived in Los Angeles to assist in loading approximately 174 kilos of cocaine into a motorhome which was destined for New Jersey.

5. In or around early July, PLUNK directed Cisco, and Pancho to transport cocaine from Los Angeles to New Jersey.

6. On or about August 21, 1993, PLUNK

directed an unindicted co-conspirator to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

7. On or about mid-September, PLUNK arranged for the transfer of ownership of a load vehicle used for transporting cocaine.

8. In or around early September, PLUNK directed Cisco to transport cocaine from Houston, Texas to New Jersey.

9. On or about October, 1993, PLUNK directed Pancho to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

10. In or around the middle of October, PLUNK directed Cisco to transport cocaine from Los Angeles to New Jersey.

11. In late October, PLUNK directed the transportation of approximately 100 kilos of cocaine from Los Angeles to New Jersey.

12. On or around Thanksgiving 1993, PLUNK directed Cisco, to transport a load of cocaine from Los Angeles to New Jersey in a Winnebago Motorhome.

13. On December 7, 1993, James telephoned PLUNK in Alaska to discuss Pancho's upcoming cocaine delivery as well as a delivery by defendant PIERSON.

14. On December 7, 1993, James telephoned Tony in California to discuss PLUNK and Pancho's upcoming arrival in Los Angeles.

15. On December 7, 1993 James telephoned Colombia to discuss "Panchito's" arrival.

16. On December 12, 1993, Pancho was arrested delivering 220 kilograms of cocaine to New Jersey.

17. On December 12, 1993, James telephoned Tony in Los Angeles and El Compadre in Colombia with news of Pancho's arrest.

18. On December 12, 1993, James telephoned PLUNK and discussed Pancho's arrest and discussed getting

a lawyer for him.

19. On December 18, 1993, James telephoned Tendler to discuss Pancho's knowledge of the organization and getting a lawyer for him.

20. On December 18, 1993, James telephoned defendant PIERSON to discuss various locations for distributing cocaine, describing the organization to be like American Express . . . "everywhere".

All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

A. Beginning at a time unknown to the Grand Jury, but no later than April 1993, and continuing thereafter up to and including December 1993, in the State and Federal District of Alaska, and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly, intentionally, and unlawfully engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 846, 841(a)(1) and 843(b), which violations, among others, were part of a continuing series of violations, included but not limited to, the following:

1. Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

Defendant herein, did willfully and knowingly combine, conspire and agree with others whose names are known or

unknown to the Grand Jury to distribute in excess of two thousand kilograms of cocaine and to possess with intent to distribute cocaine, as alleged in Count One of this Indictment, which is incorporated in full herein;

2. On or about June 4, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 174 kilograms of cocaine, as alleged in Count 9 of this Indictment, which is incorporated in full herein;

3. On or about July, 1993, in the State and Federal District of Alaska, defendant PLUNK did knowingly and intentionally distribute approximately 350 kilograms of cocaine.

4. On or about August 21, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 200 kilograms of cocaine as alleged in Count 10 of this Indictment which is incorporated in full herein;

5. On or about December 12, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 220 kilograms of cocaine as alleged in Count 11 of this Indictment which is incorporated in full herein;

6. On or about December 7, 1993,. defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 3 of this Indictment, which is incorporated in full herein;

7. On or about December 5, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 4 of this Indictment, which is incorporated in full herein;

8. On or about December 8, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 5 of this Indictment which is incorporated in full herein;

9. On or about December 11, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities, as alleged in Count 6 of this Indictment, which is incorporated in full herein;

Which series of violations were undertaken by defendant PLUNK in concert with at least five other persons with respect to whom defendant PLUNK occupied a position of organizer, a supervisory position, and other positions of management, and from which continuing series of violations defendant PLUNK obtained substantial income and resources.

B. **THE FORFEITURE PROVISIONS**

Through the above-mentioned continuing criminal enterprise, defendant

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

his nominees, assignees, agents and those in active concert and participation with him did directly and indirectly obtain substantial profits, proceeds and resources from said criminal enterprise, which shall be forfeited to the United States of America pursuant to the provisions of Title 21 U.S.C. § 853(a)(3) and which shall include all property constituting or derived from any proceeds obtained, directly or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substances violations as well as any interest in, claims against, and property or contractual rights affording said defendants a source of influence or control over the continuing criminal enterprise, including but not limited to the property described below:

1. ONE heat sealed bag of currency seized at 14940 Longbow Drive, Anchorage, Alaska on March 24, 1993 [sic], DEA Evidence number N-112.

2. Residence located at 14940 Longbow Drive, Anchorage, Alaska (Timberlux Subdivision #3, Block F, Lot 3).

3. Cabin with acreage more fully described as: T17NR5W, Section 33, Seward Prime Meridian, Alaska,

Tract A, Plat 77-49, Alaska State Land Survey No. 76-182.

4. 4.99 acres of unimproved real property, T27NR4W, Section 22, Alaska Land Survey No. 77-91, Tract A (Chase Area) MATSU Borough, Alaska.

5. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska,

a. Lot 2 Block 1
b. Lot 10 Block 1
c. Lot 11 Block 1
d. Lot 7 Block 5
e. Lot 8 Block 5
f. Lot 5 Block 6
g. Lot 6 Block 6
h. Lot 7 Block 6

6. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska.

7. Real property located at Tract B, Lot 3 #66, Sky Harbor Estates, Anchorage, Alaska.

8. Big Mountain Lodge, Igiugig, Alaska more particularly described as Lease Number 92-L-02, a portion of Lot 3, U.S. Survey 7982, Native Allotment AA-6277, located near Igiugig, Alaska, located in the Kvichak Recording District, State of Alaska, containing 14.057 acres.

If any of the properties described above as being subject to forfeiture pursuant to Title 21 United States Code, Section 853, as a result of any act or omission of the defendants —

a. cannot be located upon the exercise of due diligence;
b. has been transferred to, sold to, or deposited with a third party;
c. has been placed beyond the jurisdiction of this court;
d. has been substantially

diminished in value; or

e. has been commingled with other properties that cannot be subdivided without difficulty;

it is the intent of the United States of America, pursuant to Title 21, United State [sic] Code, Section § 853(p), to seek forfeiture of any properties of the defendants up to the value of the properties listed above as subject to forfeiture.

All pursuant to Title 21, United States Code, Section 853 and 848.

COUNT 3

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 7, 1993, at approximately 7:49 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offense to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 4

THE GRAND JURY CHARGES THAT:

On or about December 5, 1993, at approximately 11:59 AM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"

AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 5

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 8, 1993, at approximately 3:43 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 6

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 11, 1993, at approximately 4:03 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a

communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. §846 and the distribution of cocaine, in violation of Title 21 U.S.C. §841(a)(1);
All in violation of Title 21 U.S.C. §843(b).

COUNT 7

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 15, 1993, at approximately 3:33 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b),

COUNT 8

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 18, 1993, at approximately 1:03 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute

cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 9

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 4, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 174 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21, U.S.C. § 841(a)(1).

COUNT 10

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 21, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 200 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 11

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 12, 1993, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 220 kilograms of cocaine, a Schedule II Controlled Substance in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES THAT:

Between on or about the Fall of 1980, until December 31, 1993,

GERALD FRANK PLUNK

defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance. One primary objective of the organization was the receipt of kilogram quantities of cocaine from Florida. The primary objective of the organization was to provide quantities of cocaine to local (Alaskan) drug traffickers for financial gain. All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/S/
PRESIDING GRAND JUROR

/s/ Karen L. Loeffler
for ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY
ORGANIZED CRIME DRUG ENFORCEMENT
TASK FORCE

4/26/94
DATE

ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney

Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Mar 23 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	)
	) **COUNT 1**
vs.	) **CONSPIRACY TO**
	) **DISTRIBUTE**
	) **COCAINE,**
GERALD FRANK PLUNK,	) Vio. Title 21 U.S.C.
	) § 841(a)(1) and 846
Defendant.	)

INDICTMENT

THE GRANT JURY CHARGES THAT:

COUNT 1

Between on or about the Fall of 1987, until no later than April, 1991, the exact dates of which are unknown,

the defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/s/
PRESIDING GRAND JUROR

/s/ Robert C. Bundy
ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY

3/22/94
DATE

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

United States Constitution:

Fourth Amendment. Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or

pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes:

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in

effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. The court,

at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any

additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. § 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. § 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing

criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 U.S.C. § 848] and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

19 U.S.C. § 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

19 U.S.C. § 1603. Seizure; warrants and reports

(a) Process for search warrant

Any property which is subject to forfeiture to the United States for violation of the customs laws and which is not subject to search and seizure in accordance with the provisions of section 1595 of this title, may be seized by the appropriate officer or person upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. This authority is in addition to

any seizure authority otherwise provided by law.

(b) Customs officer's reports

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. § 1604. Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

19 U.S.C. § 1605. Seizure; custody; storage

All vessels, vehicles, aircraft, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

19 U.S.C. § 1606. Seizure; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws.

19 U.S.C. § 1607. Seizure; value $500,000 or less, prohibited articles, transporting conveyances

(a) Notice of seizure

If--

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the

importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance or listed chemical; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) "Controlled substance" defined

As used in this section, the terms "controlled substance" and "listed chemical" have the meaning given such terms in section 802 of Title 21.

(c) Report to Congress

The Commissioner of Customs shall submit to the Congress, by no later than February 1 of each fiscal year, a report on the total dollar value of uncontested seizures of monetary instruments having a value of over $100,000 which, or the proceeds of which, have not been deposited into the Customs Forfeiture Fund under section 1613b of this title within 120 days of seizure, as of the end of the previous fiscal year.

19 U.S.C. § 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1609. Seizure; summary forfeiture and sale

(a) In general. If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 613 [19 USCS § 1613], into the Customs Forfeiture Fund.

(b) Effect. A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages

pursuant to subsection O of section 30 of the Ship Mortgage Act, 1920 (46 U.S.C. App. 961) or any corresponding revision, consolidation, and enactment of such subsection in title 46, United States Code) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. ... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision

of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives or ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, is derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendants is an individual or $5,000,000 if the defendant is other than an individual, or both. ... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment

and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

21 U.S.C. § 843. Prohibited acts C

Unlawful acts

* * *

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * *

Penalties

(d) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in

accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

* * *

21 U.S.C. § 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court

may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to

which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate

restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation

of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a

legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner

rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(q) Restitution for cleanup of clandestine sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture of methamphetamine, may--

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States for the costs incurred by the United States for the cleanup associated with the manufacture of methamphetamine by the defendant; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663 of Title 18.

21 U.S.C. § 881. Forfeitures

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

(3) All property which is used, or intended for

use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of

an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act [21 USCS § 857]).

(11) Any firearm (as defined in section 921 of title 18, United States Code) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules of Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules of Certain Admiralty and

Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) **Custody of Attorney General.** Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services

Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable. The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property. (1) Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

* * *

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code, or any other

provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

[(k)](l) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States;

or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to

another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the

United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the

Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.